(33,569)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 260

IVY L. LEONARD AND THOMAS B. LEONARD, COPARTNERS, TRADING AS I. L. LEONARD & COMPANY, PLAINTIFFS IN ERROR AND APPELLANTS,

vs.

SWEPSON EARLE, CONSERVATION COMMISSIONER OF MARYLAND AND HEAD OF THE CONSERVATION DEPARTMENT OF THE STATE OF MARYLAND

IN ERROR TO AND APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

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[fols. 1-3] **IN BALTIMORE CITY COURT**

Ivy L. Leonard and Thomas B. Leonard, Copartners, Trading as I. L. Leonard and Company,

vs.

Swepson Earle, Conservation Commissioner of Maryland and Head of the Conservation Department of the State of Maryland

[fol. 4] Petition for Writ of Mandamus—Filed Sept. 28, 1927

To the Honorable the Judge of the Baltimore City Court:

The petition of Ivy L. Leonard and Thomas B. Leonard, co-partners trading as I. L. Leonard and Company, respectfully represents:

1. That your petitioners, Ivy L. Leonard and Thomas B. Leonard, are both adults, residing in the City of Cambridge, in Dorchester County, in the State of Maryland, and that they are both citizens and residents of said City, County and State, that they are co-partners, and that they trade and are engaged in business in said City, County and State, under the firm name of I. L. Leonard and Company, and that they have been engaged in the business of packing oysters for several years last past, and they desire and intend to pack oysters at said City, County and State during the oyster packing season, beginning September 1, 1927, and ending on the 25th day of April, 1928.

2. That your Petitioners own in fee simple, a lot of land with buildings and improvements thereon, and with proper equipment for packing oysters, located in said City, County and State, which property is of the value of several thousand dollars, upon which property your Petitioners now pay, and for several years last past have paid, city taxes to the City of Cambridge, county taxes to Dorchester County, and state taxes to the State of Maryland, and if they are prevented from using the said property for the packing of oysters during the said season, they will suffer irreparable loss, injury and damage, of a nature, kind and

extent that cannot be certainly determined, so that the same might be recovered in any action at law, because the amount of the said business they would do is impossible to be accurately estimated, so as to be sufficiently definite to be recovered at law, therefore, if they are prevented from using the said property for the said purpose during the said season, their injury, damage and loss will be irreparable.

3. That during the oyster packing season of 1926, at their said place of business, and using the said property, they packed 50,800 bushels of oysters and in the oyster packing seasons of 1925 and 1926, they packed 52,714 bushels of oysters, that in each of said years, about ten per cent. of the oysters backed by them, were oysters that they bought [fol. 5] outside of the State of Maryland, or about ten per cent. of all the oysters used and packed by your petitioners do not come from the waters or the natural oyster bottoms of the State of Maryland, but are from the waters and oyster bottoms of other states, and that during the said oyster packing season of 1926 and 1927, at least ten per cent. of their total pack were oysters from other states than the State of Maryland, that in addition to the said oysters from other states than Maryland, your petitioners during the said packing season of 1927 and 1928, would use oysters from rented or leased bottoms in the State of Maryland, that is, they would use about ten per cent. of oysters from other states than Maryland, and in addition would use and pack oysters from leased bottoms in the State of Maryland, as well as oysters from the natural oyster rocks of the State of Maryland.

That your Petitioners are informed, and they therefore allege, that there are during each year, shucked and packed in the State of Maryland, by various persons, firms and corporations, engaged in the packing of oysters, large quantities of oysters from other States, particularly from the States of Virginia and New Jersey, and that in certain sections of the State of Maryland, particularly in Somerset County, Maryland, the quantity of oysters from the State of Virginia shucked and packed by packers and canners in said section and county, approximates fifty per cent. of all the oysters shucked and packed therein.

4. That your Petitioners, in preparation for their engaging in the packing of oysters from September 1, 1927, to

April 25, 1928, on the 30th day of August, 1927, filed with the Defendant, an application for a license to pack oysters, your Petitioners having but one place for said business, or having but one house in which they engage in said business, which is the property hereinbefore mentioned, which application was accompanied by the check of your petitioners for Twenty-five (25) Dollars, to pay for the said license, which said application, together with the said check, was refused by the Defendant, because the application was not in the form prescribed by the Conservation Department, as set forth in the letter of the Defendant, refusing the said application.

[fol. 6] The original of said application, together with the check accompanying the same and the letter of the Defendant refusing the application, is herewith filed as part hereof, marked "Petitioner's Exhibit 1."

5. That by the Acts of the General Assembly of Maryland, 1922, Chapter 29, and 1916, Chapter 682, the same being Section 1 of Article 19A of the Code of Public General Laws of Maryland, 1924 (Bagby's), a Conservation Department of the State of Maryland was created and established and that the head of the said Department should be the Conservation Commissioner, that Swepson Earle, Esq., has been duly appointed and has fully qualified as the head of the said Conservation Department and is the Conservation Commissioner under the provisions of the said Article of the Code of Public General Laws of Maryland.

6. That by Section 91 of Article 72 of the Code of Public General Laws of Maryland, 1924 (Bagby's), title "Oysters," sub-title "Packing Oysters," it was provided:

"It shall be unlawful for any person, firm or corporation having a fixed place of business, buying oysters and employing labor to prepare them for market to engage in the business of buying, selling, marketing, packing or canning oysters without first taking out a license to engage in such business by application to the clerk of the Circuit Court for the county in which the place of business of such applicant may be situated, or to the clerk of the Court of Common Pleas, if the place of business of such applicant shall be in Baltimore City; and such applicant, at the time such license is issued to him by the said clerk shall pay

to said clerk the sum of twenty-five dollars for such license, and said license shall have effect from the first day of September, in the year in which it may have been obtained, to the twenty-fifth day of April, inclusive, next succeeding; and all said moneys received for said license shall be paid over and accounted for by the several clerks of the Courts to the Comptroller of the State, to be placed to the credit of the Conservation fund, as provided by Section 33 of this Article. Where any such person, firm or corporation, operates more than one house for the buying, selling, marketing, packing or canning of oysters, a separate license shall [fol. 7] be obtained for each house in which oysters are shucked or otherwise prepared for market."

7. That by an Act of the General Assembly of Maryland, 1927, Chapter 119, by Section 1 of said Act, the aforesaid Section 91 of Article 72 of the Code of Public General Laws of Maryland, title "Oysters," sub-title "Packing Oysters," providing for licensing of oyster packers was repealed and re-enacted with amendments, to read as follows:

"Whereas, the demand for oysters is constantly increasing and the oyster bars and rocks of Chesapeake Bay and its tributaries are showing such great depletion that constructive legislation is necessary to preserve and rehabilitate such depleted areas, and

"Whereas, a Seafood Committee, consisting of representatives from each tidewater county, was appointed by Governor Albert C. Ritchie, to investigate and recommend remedial legislation to increase the oyster supply of Maryland, among which was the recommendation that the State should reserve ten per cent. of all shells made by the oyster packing houses to be planted upon reserved and seed areas; therefore:

Section 1. Be It Enacted by the General Assembly of Maryland, That Section 91 of Article 72 of the Code of Public General Laws of Maryland, title "Oysters," sub-title "Packing Oysters," providing for licensing of oyster packers be and is hereby repealed and re-enacted with amendments, to read as follows:

91. It shall be unlawful for any person, firm or corporation having a fixed place of business, buying oysters and

employing labor to prepare them for market to engage in the business of buying, selling, marketing, packing or canning oysters without first taking out a license to engage in such business by application to the Conservation Department of Maryland. Where any such person, firm or corporation operates more than one house for the buying, selling, marketing, packing or canning of oysters, a separate license shall be obtained for each house in which oysters are shucked or otherwise prepared for market: such license to be in the nature and form of a contract between the [fol. 8] State of Maryland and the applicant and shall provide for the payment of a license fee of twenty-five dollars, and shall further provide that the licensee must turn over to the State of Maryland at least ten per cent. of the shells from the oysters shucked in his establishment for the current season, said shells to be removed on or before the twentieth day of August of said season; or at the discretion of the Conservation Department its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the close of the season. The Conservation Department shall notify each packer or canner on or before the said first day of May whether it is its intention to take the ten per centum of the shells from oysters shucked as aforesaid, or its equivalent in money. Said license shall have effect from the first day of September in the year in which it may have been obtained until the twenty-fifth day of April, inclusive, next succeeding.

Sec. 2. And Be It Further Enacted, That a new section to be known as 91-A be added to Article 72 of the Code of Public General Laws of Maryland, title "Oysters," to follow immediately after Section 91 of said Article, be and is hereby added to read as follows:

91-A. All moneys derived from said license fee of twenty-five dollars shall be paid over to the Comptroller to be credited to the Conservation Fund, and one-half of the shells received by the Conservation Department shall be transplanted upon such natural beds or bars as may be reserved by the Conservation Commissioner as provided for elsewhere in this Article, and the other one-half of said shells shall be planted on such seed areas as may be set

aside by the Conservation Commissioner for seed oysters. In case money is paid in lieu of the ten per cent. of shells, the Conservation Commissioner shall convert same into shells or seed oysters to be transplanted in like manner.

Sec. 3. And Be It Further Enacted, That all laws or parts of laws of the State of Maryland, general or local, inconsistent with the provisions of this Act be and the same are hereby repealed to the extent of such inconsistency.

[fol. 9] Sec. 4. And be it further enacted, That this Act shall take effect June 1st, 1927."

8. That the said Act of 1927 embraces two subjects, one subject providing for the issuing of license for the packing of oysters, in which the aforesaid Section 91 of Article 72 of the Code of 1924 is entirely re-enacted, except that the Conservation Department of Maryland shall issue the licenses under the new Act, whereas, under the old Section, the license was issued by the Clerk of the respective counties of Maryland, or the Clerk of the Court of Common Pleas of Baltimore City, the only change made in the new Act on the subject of license, being changing the place of issue from the said Clerks of Court to the Conservation Department.

9. The other or second subject in the new Act of 1927, is a provision that the license to pack oysters shall be in the nature and form of a contract between the State of Maryland and the applicant, and that it should provide that the licensee must turn over to the State of Maryland at least ten per cent of the shells from the oysters shucked in his establishment for the current season, said shells to be removed on or before the 20th day of August of said season, or in the discretion of the Conservation Department, its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the close of the season, the Conservation Department to notify each packer or canner on or before the said 1st day of May, whether it is its intention to take the ten per cent of the shells from oysters shucked, as aforesaid, or its equivalent in money.

10. That whereas the said Act of 1927, declares the license to pack oysters to be in the nature and form of

a contract between the State of Maryland and the applicant, yet no person or department of the State is by said Act or by law of the State, designated, empowered or authorized to execute any such contract.

11. That the said Act declared that at least ten per cent of the shells from the oysters shucked in the establishment of the licensee for the season for which license is issued, shall be turned over to the State of Maryland, which would [fol. 10] apply to shells from oysters from the natural oyster rocks of Maryland and also shells from oysters from other states, and not from Maryland, and also to shells from oysters from oyster bottom leased by the State of Maryland, to oyster planters, the said provision as to shells not only applying to Maryland natural rock oysters, but to shells from oysters from all other places other than the Maryland natural oyster rocks.

12. That your Petitioners deny that the State of Maryland can legally take or require of them to turn over to the State, the shells from oysters that they buy from out of the State of Maryland or to oysters that they buy from planters of oysters on and from oyster bottom leased by the State of Maryland, and they further deny that the State of Maryland can compel them or legally require them to turn over to it shells from oysters from the natural oyster rocks of Maryland, because in reference to the last named oysters, the catcher of the oysters is permitted to sell them outright, without any reservation by the State as to shells, so that the said oysters from the natural oyster rocks of Maryland, when purchased by your Petitioners, become their own private and individual personal property, and that as to oysters they buy from out of Maryland, and leased bottoms in the State, the State never had any right or claim to them at all.

13. Your Petitioners therefore allege, that the said provision of the said Act of 1927, as to the oyster shells required to be turned over to the State or, in the discretion of the Conservation Commissioner, money in lieu of shells, is in violation of the following provisions of the Constitution of the United States and of the Constitution of the State of Maryland, to wit:

A. Article 14, of the Constitution of the United States:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The said Act of 1927, in imposing upon oyster packers the burden of a contribution of shells or money, first, classifies oyster packers from all other persons engaged in the [fol. 11] oyster business, and picks them out and sets them apart as a class of citizens upon whom is imposed this burden, thereby denying to them, as citizens, the privileges and immunities that are still enjoyed by other persons in the said business, because the catcher of oysters and all persons who buy or handle them until they are shucked, have them as their absolute property, but, when they pass to the packer who shucks them, this burden is imposed upon the packers, which is an abridgement of their privileges and immunities as citizens of the United States.

(1) "Nor shall any state deprive any person of life, liberty or property without due process of law."

Inasmuch as the Statute declares that, in the discretion of the Conservation Commissioner, money shall be given by the packer in lieu of shells, and the amount shall be fixed at the market price on the 1st day of May, when, as a matter of law, the meaning of the expression "Market Price," is a price fixed by the buyer and seller in an open market, in the usual and ordinary course of lawful trade and competition, the price or value of the articles established or shown by sales, public or private in the ordinary way of business, or the fair value of the property as between one who desires to purchase and one who desires to sell, the current value.

This act, therefore, leaves out of consideration and takes no consideration of the desire or wish of the packer to sell, but arbitrarily compels him to sell, which is a direct opposite of due process of law.

(2) "Nor deny to any person within its jurisdiction the equal protection of the law."

Under the Act of 1927, the catcher, or buyer from the catcher, or any person who handles oysters except a packer,

can sell the oysters out of the State of Maryland, and the condition of rendering shells or money in lieu of shells does not apply or affect or touch such person at all, therefore, this act discriminates in favor of citizens and people of other states against citizens or people of the State of Maryland, and denies to the packers, as a class, the equal protection of the law, but imposes upon them a burden which is [fol. 12] not imposed upon any other persons who handle oysters, and which is imposed upon Maryland packers, but does not touch a foreign packer or packer out of the State.

B. Article 1, Section 10, Constitution of the United States:

"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The Act of 1927, by compelling a packer to give ten per cent of shells or money in lieu of shells, applies to oysters brought from, and brought into the State of Maryland, from other States, and on the face of the Act of 1927, it is not an inspection law, or does not impose this burden for the purpose of inspection, and therefore, it is laid, and has the effect of a tax upon imports, but more particularly this Act of 1927 does not conform to the Constitutional requirement of a provision to raise money for regulation or inspection, but on its face, purports to be a revenue law.

C. Article 4, Section 2 of the Constitution of the United States:

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

For the reasons hereinbefore given, with reference to Article 14, Section 1 of the Constitution of the United States, oyster packers as a class of citizens are denied privileges and immunities as citizens of the State of Maryland, and as compared to citizens of the other several states of the Union, in that this burden is placed upon them exclusively and only.

D. Declaration of Rights, Constitution of Maryland, Article 8:

"That the legislative, executive and judicial powers of government ought to be forever separate and distinct from each other, and no person exercising the functions of one of said departments, shall assume or discharge the duties of any other."

In the Act of 1927, the Legislature has attempted to delegate to an administrative or executive department of the Government, the power of levying or fixing the rate and [fol. 13] amount of taxation, in that it attempted to grant to the Commissioner, the power, in his discretion, to determine whether his department will take shells, that is, property, or money, and says on the first day of May, the Commissioner would consider all the circumstances of the price oyster shells are selling for, and whether or not he could buy them on the first of May at such price that they might advance or be less in price between then and the time of removal of the shells, and is an attempt to vest in the Commissioner the power of determining what shall be the price paid, and his election to take either shells or money, is an attempt to vest in him the power to impose, levy and collect a tax, while the Legislature alone can fix the amount of tax, and it must be uniform on the same class of property throughout the State, whereas, oyster shells will undoubtedly have a different price in one location from that in another location in the State, and if the Commissioner was to decide that money in lieu of shells would serve his purpose better, then that would have to be done throughout the State, because one packer could not give shells and other money, and the attempt to place this power in one of the Departments, is combining it with the judicial, executive and legislative departments of the State, because it is an attempt to place all three powers in this department, in other words, the Legislature cannot delegate to a department the power to determine what amount is due by one person or any person, which is in the nature of a tax, as that must be fixed by the Legislature alone.

E. Article 15 of the Declaration of Rights, Constitution of Maryland:

"And all taxes thereafter provided to be levied by the State, for the support of the General State Government and by the Counties and by the City of Baltimore, for their respective purposes shall be uniform as to land within the taxing district and uniform within the class or sub-class of improvements on land and personal property, which the respecting taxing powers may have directed to be subjected to the tax levy."

As hereinbefore stated, with reference to the Constitution of the United States, the Act of 1927, attempts to impose a tax upon oyster shells in the hands of a packer, but [fol. 14] does not impose it upon oysters in the hands of any other class of persons, therefore, this attempted tax is not uniform, as to the same class of personal property, but is laid upon it in the hands of a particular selected class of persons, and such taxes are not laid with a political view for the good government and benefit of the community, because it is not a regulation or occupational tax, but on its face, purports to be an act to raise revenue, and revenue which is devoted for the benefit of those who catch and sell oysters, but do not pack them, they receiving the sole benefit of this tax, therefore, it is not for the general welfare of the whole State, and all the people therein.

F. Article 23 of the Declaration of Rights, the Constitution of Maryland:

"That no man ought to be taken or imprisoned or disseized of his freehold, liberty or privileges or outlawed or exiled or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or by the law of the land."

The act of 1927 violates this provision of the Maryland constitution for the reasons hereinbefore set forth, with reference to Article 14, Section 1, and Article 4, Section 2 of the Constitution of the United States.

G. Article 3, Section 40, the Constitution of Maryland:

"The General Assembly shall enact no law authorizing private property to be taken for public use, without just

compensation as agreed upon between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation."

The act of 1927, by taking oyster shells or money in lieu of shells from the packer, that do not come from the waters or the natural oyster grounds or rocks of the State of Maryland, or shells that come from oysters on bottoms leased by the State of Maryland, takes property which is exclusively that of the packer, even if it is conceded that the State could take shells from the oysters from its natural oyster grounds or rocks, and it is upon this theory only, that this Act can have the slightest reason to stand, but even so, it goes still further and takes the property or money in lieu of property, which comes from other waters or grounds than the State of Maryland, or from grounds [fol. 15] which the State has leased, in neither case does the State have the slightest claim to the property, and, of course, the Act does not provide any compensation, private property cannot be taken by the State, for private reasons, and if the oyster shells or money, taken by the State, is for a class of people, that follow oystering only, then it is a taking of private property, which cannot be done under the Constitution, and if it is a public use, or is so considered, still no compensation is provided and the property cannot be taken.

14. That the provision in the said Act of 1927, which provides "Or at the discretion of the Conservation Department, its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the close of the season. The Conservation Department shall notify each packer or canner on or before the said first day of May whether it is its intention to take the ten per cent. of the shells from oysters shucked as aforesaid, or its equivalent in money," is an unconstitutional attempt on the part of the Legislature to delegate the taxing power, which is vested in the General Assembly exclusively, in as much as said provisions of said Act places it in the discretion of the said Conservation Department to determine whether it will take property or money in lieu of property, and how much or to what extent would be delegating to a Department or an officer of

the State Government, the power to determine the levying of a tax.

15. That the said Act of 1927, as to the provision therein as to shells or money in lieu of shells, is not a license fee imposed for the purpose of regulating or restraining any business or occupation or imposed in the exercise of the police power, but the object of the said Act as to the said subject of shells, is to raise revenue.

16. That it is possible that the two subjects of the said Act of 1927, that is, the one subject which re-enacts section 91 of Article 72 of the Code of Public General Laws of Maryland, with the exception of a change as to the place of issue of license, can be separated entirely from the second subject of the said Act, which requires the licensee to give ten per cent. of oyster shells or money in lieu of shells and if the two subjects can be separated by the Court [fol. 16] then that part of the Act with reference to the first subject is constitutional, while the second subject of the Act, as to shells or money in lieu of shells is unconstitutional, and your petitioners allege that the said second subject of the said Act of 1927, is unconstitutional, but if the said two subjects are so inextricably joined that they cannot be separated, then the entire Act is unconstitutional.

17. That assuming the Constitutionality of the said Act of 1927 as to the subject of shells, or money in lieu of shells, the said Conservation Commissioner, prior to the first day of September, 1927, delivered to your Petitioners a form of application for them to sign, which application recites that it is in accordance with the terms of the license which may be granted to the applicant as provided for in Chapter 119 of the Acts of 1927 and it further recites that the applicant has read Section 91 of Article 72 of the Code of Public General Laws of Maryland as the same is printed below in the application, and the applicant agrees to execute the contract as to the delivery of ten per cent. of shells to the State of Maryland, or its equivalent in money, under the condition therein provided and at the bottom of the said application is a copy of the said Chapter 119 of the Acts of 1927, which is so referred to in the application as to incorporate the Statute therein.

A copy of the said application being filed herewith marked "Petitioner's Exhibit 2."

18. That the said Conservation Commissioner has prepared a formal contract, to be signed by the applicant for a license, all of which is to follow and to be subsequent to the application hereinbefore referred to, in which contract the said Conservation Commissioner is a contracting party, though the said Statute does not confer such power and authority upon him, for it designates no person or department to execute any contract, and in this purported contract, the licensee is required to agree to turn over to the State of Maryland at least ten per cent. of shells from the oysters shucked at his establishment for which the license is issued for the current season.
[fol. 17] A copy of said contract being herewith filed marked "Petitioner's Exhibit 3."

19. That all of the provisions of the said Chapter 119 of the Acts of 1927, purporting to declare a license to pack oysters a contract between the licensee and the State of Maryland, by which the licensee shall turn over to the State of Maryland at least ten per cent. of the shells from all the oysters shucked by the licensee or the equivalent thereof in money, in the discretion of the Conservation Department, is in violation of both the Constitution of the United States and the Constitution of the State of Maryland, as hereinbefore recited, and your Petitioners allege that all of said provisions and the whole of said subject of the said Act is invalid and that your Petitioners are entitled to a license as they have applied for, without the said provision as to shells, or money in lieu of shells being in any way applicable to them, because the said provision is void.

20. That your petitioners having duly applied to the said head of the Conservation Department of Maryland and the said Conservation Commissioner of Maryland for a license as aforesaid, and having duly tendered to him all lawful charges therefor and having done any and all acts and things lawfully required of them in connection therewith, and having been denied and refused such license by him, except upon the condition that your petitioners should enter

into the agreement and contract as hereinbefore alleged, in accordance with the provisions of said Chapter 119 of the Acts of 1927, which said Act, in so far as it undertakes to require such contract or agreement, your petitioners expressly allege and assert is unconstitutional and void, your petitioners are without remedy in the premises unless the said Conservation Department of Maryland shall be ordered and directed by this Court to issue a license to said petitioners to engage in the buying, selling, marketing, packing and canning of oysters without requiring your said petitioners to enter into any contract or agreement or to accept a license in the nature and form of a contract or agreement between the State of Maryland and your petitioners, that they, the said petitioners, shall turn over to the State of Maryland at least ten per cent. of the shells [fol. 18] from the oysters shucked in their establishment for the current season, or, at the discretion of the Conservation Department, its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the close of the season.

21. That the appropriate remedy of your petitioners, is by the writ of mandamus, to have the Court declare null and void, the part of the aforesaid Act of 1927, which fixes as a condition, to the obtaining of a license to pack oysters, that the licensee shall give to the State oyster shells or money in lieu of the shells.

22. Your petitioners therefore, pray your Honors that a writ of mandamus may be issued, directed to the said Swepson Earle, Esq., head of the Conservation Department of Maryland and the Conservation Commissioner of Maryland, commanding him to issue a license to pack oyster, without any obligation or duty in the nature of a contract or otherwise, to turn over to the State of Maryland, any oyster shells or money in lieu of shells and that the said license shall be issued to your petitioners as formerly issued under Section 91 of Article 72 of the Code of Public General Laws of Maryland, 1924, except that the

license shall be issued by the Conservation Commissioner instead of the Clerk of the Court.

And, as in duty bound, etc.,

I. L. Leonard and Company, by Thos. B. Leonard, Petitioners. V. Calvin Trice, Attorney for Petitioners, Cambridge, Md.

[fol. 19] PETITIONERS' EXHIBIT NO. 1 AND CHECK FOR $25.00 FILED WITH THE PETITION FOR MANDAMUS

Application to Buy, Sell, Market, Pack, Can Oysters or Otherwise Prepare Them for Market

Application is hereby made to the Conservation Department of Maryland, Hon. Swepson Earle, Commissioner, by Ivy L. Leonard and Thomas B. Leonard, co-partners, trading as I. L. Leonard & Co., for a license to buy, sell, market, pack or can oysters, or otherwise prepare them for market during the oyster season beginning September 1st, 1927, said operations to be at our one and only plant for such business, located in the City of Cambridge, Dorchester County, Maryland, and the sum of twenty-five dollars ($25.00) by check, is herewith inclosed for the said license, we are both residents and citizens of Dorchester County, State of Maryland.

In making this application, we deny that the said license will be a contract between us and the State of Maryland, by which we will render or turn over to the State of Maryland, and shells, or money in lieu of shells and we will not execute any contract for said purpose, nor will we turn over to the State of Maryland and shells, or money in lieu of shells.

This application for license is made to the Conservation Department of Maryland, because the Acts of the General Assembly of Maryland, 1927, Chapter 119, is one of its provisions, requires the license to be issued by the said Department, but these applicants deny that the provisions of the said Act, making the license a contract between the licensee and the State and requiring the licensee

to turn over to the State of Maryland at least ten per cent of the shells, or money in lieu of shells, are constitutional, and said provisions of the said Act violates the constitutions of the United States, and of the State of Maryland, and it may be that said provisions may make the whole Act invalid or invalid in part, as the case may be, and these applicants reserve all their rights to contest the consti- [fol. 20] tutionality of the said Act of Assembly, in the Courts of the State of Maryland.

I. L. Leonard and Co., by T. B. Leonard.

Dated at Cambridge, Maryland, this 30th day of August, 1927.

Check of I. L. Leonard and Company for $25.00 Filed with Petitioners' Exhibit No. 1

Cambridge, Md., Aug. 30, 1927. No. —.

The National Bank of Cambridge

Pay to the order of Conservation Department $25.00. Pay 25 and 00 cts. —Dollars.

I. L. Leonard & Company, by T. B. Leonard.

On the stub end of check: I. L. Leonard & Co., Oyster Packers.

Written across the face of the check is the following: Good when properly endorsed. T. Hanna Smith, Assistant Cashier.

Letter of Swepson Earle, Commissioner, Dated August 31st, 1927, and Directed to C. Calvin Trice, Attorney at law, Cambridge, Maryland, and Marked Petitioners' Exhibit No. 1

[fol. 21] State of Maryland, Conservation Department, 512 Munsey Bldg., Baltimore, Md.

August 31st, 1927.

V. Calvin Trice, Esq., Attorney-at-law, Cambridge, Maryland.

DEAR SIR: We are in receipt of your letter of the 30th instant, enclosing application for oyster packer's license by Messrs. I. L. Leonard Company of Cambridge, Maryland. The application is not in the form prescribed by this Department, and we must, therefore, refuse to accept the same. The application and your check for $25.00 are herewith returned.

Very truly yours, Swepson Earle, Commissioner.

SE/M.
ENCL.

PETITIONERS' EXHIBIT No. 2 FILED WITH THE PETITION FOR MANDAMUS

Application to Buy, Sell, Market, Pack, Can Oysters or Otherwise Prepare Them for Market

Application is hereby made to the Conservation Department of Maryland by* ——— ———, (Postoffice address:) ——— ———, for a license to buy, sell, market, pack, or can oysters, or otherwise prepare them for market during the oyster [fol. 22] season beginning September 1st, 19—, said operations to be at — plant, located at (Street and Number:) ———, (City:) ———.

The sum of Twenty-five ($25.00) Dollars is herewith enclosed to apply in accordance with the terms of the license which may be granted to —, as provided for in Chapter 119 of the Acts of 1927.

I have read Section 91 of Article 72, of the Code of Public General Laws of Maryland as same is printed below, and agree to execute the contract as to the delivery of ten per cent. of shells to the State of Maryland, or its equivalent in money, under the conditions therein provided.

——— ———.

(*If corporation, give correct corporate name. If partnership, state correct name of each member of firm.)

(Applicant should tear off here and keep for his information.)

Section 91 of Article 72 of the Code of Public General Laws of Maryland, Title "Oysters," Subtitle "Packing oysters," as Same was Repealed and Re-enacted by Chapter 119 of the Acts of 1927

91. It shall be unlawful for any person, firm or corporation having a fixed place of business, buying oysters and employing labor to prepare them for market to engage in the business of buying, selling, marketing, packing or canning oysters without first taking out a license to engage in such business by application to the Conservation Department of Maryland. Where any such person, firm or corporation operates more than one house for the buying, selling, marketing, packing or canning of oysters, a separate license should be obtained for each house in which oysters are shucked or otherwise prepared for market; such license to be in the nature and form of a contract between the State of Maryland and the applicant and shall provide for the [fol. 23] payment of a license fee of twenty-five dollars, and shall further provide that the licensee must turn over to the State of Maryland at least ten per cent. of the shells from the oysters shucked in his establishment for the current season, said shells to be removed on or before the twentieth day of August of said season; or at the discretion of the Conservation Department its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the close of the season. The Conservation Department shall notify each packer or canner on or before the said first day of May whether it is its intention to take the ten percentum of the shells from oysters shucked as aforesaid, or its equivalent in money. Said license shall have effect from the first day of September in the year in which it may have been obtained until the twenty-fifth day of April, inclusive, next succeeding.

PETITIONERS' EXHIBIT NO. 3 FILED WITH THE PETITION FOR MANDAMUS

This agreement, made this — day of ——, in the year Nineteen Hundred and ——, by and between the State of Maryland, by the Conservation Commissioner, party of the first part and —— ——, part- of the second part:

Whereas, the General Assembly of Maryland, at its session held in the year Nineteen Hundred and Twenty-seven, by Chapter 119, repealed and re-enacted Section 91 of Article 72 of the Code of Public General Laws of Maryland, title "Oysters," sub-title "Packing Oysters," so as to require any person, firm or corporation desiring to buy, sell, market, pack or can oysters or otherwise prepare them for market, to secure separate license for each house; prescribing a fee of Twenty-five Dollars for each license and providing further that such licensee must turn over to the State at least ten per cent. of the shells from the oysters shucked in — establishment or its equivalent in money, and that such license shall be in the form of a contract between the State of Maryland and the Licensee;

Now, therefore, this agreement witnesseth, That in con- [fol. 24] sideration of the premises and the sum of twenty-five dollars, and the agreement on the part of the part- of the second part to turn over to the State of Maryland at least ten percentum of the shells from the oysters shucked, if any, in or at the establishment for which this license is issued for the current season; provided said shells are removed on or before the twentieth day of August following expiration of this license; or at the discretion of the party of the first part, its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the season for which this contract is executed;

The State of Maryland hereby grants unto —— —— a license, previously applied for by the part- of the second part, to engage in the business of buying, selling, marketing, packing, canning or otherwise preparing for market oysters at — plant located at —— from the first day of September, in the year Nineteen Hundred and ——, until the twenty-fifth day of April, inclusive, next succeeding; and the part- of the second part, in consideration thereof, agrees to comply with the terms of this agreement, provided the party of the first part shall notify the part- of the second part on or before the first day of May next succeeding the granting of this license whether it is the intention of the party of the first part to take the ten percentum of shells of oysters shucked as aforesaid, or its equivalent in money. But if the party of the first part shall fail to

notify the part- of the second part on or before said first day of May as aforesaid, then the part- of the second part may at — option either furnish the ten percentum of shells required or its equivalent in money, to be determined as above provided.

Witness the hands and seals of the parties hereto, the day and year first above written.

The State of Maryland, by —— ——, Conservation [fol. 25] Commission of Maryland. Attest: —— ——, Chief Clerk. Signature of Corporation: —— ——, by —— ——, President. Attest: —— ——, Secretary.

Test: —— ——. (Seal.)
Test: —— ——. (Seal.)
Test: —— ——. (Seal.)

Affidavit on the Petition for a Writ of Mandamus

State of Maryland,
Dorchester County, ss:

I hereby certify that on this 26 day of September, 1927, before me, the subscriber, a Notary Public, of the State of Maryland, in and for Dorchester County, personally appeared Thomas B. Leonard, one of the Petitioners named in the aforegoing petition and a member of the partnership or firm consisting of himself and Ivy L. Leonard, trading as I. L. Leonard and Company, and he made oath in due form of law that the matters and things stated in the aforegoing petition are true, to the best of his knowledge, information and belief.

As witness my hand and seal Notarial.

George W. Meekins, Notary Public. (Seal.)

[fol. 26] In Baltimore City Court

Order to Show Cause

The aforegoing petition, exhibits and affidavit, having been read and considered, it is thereupon, this 28th day of September, 1927, by the Baltimore City Court, ordered that a Rule be, and it is hereby laid upon Swepson Earle,

Esq., head of the Conservation Department of Maryland, requiring him to show cause, on or before the 8th day of October, 1927, why the writ of mandamus should not be issued as prayed in the aforegoing petition, and that the 10th day of October, 1927, be, and it is hereby fixed for a hearing of the said petition, provided a copy of this order be served on the said Swepson Earle, Esq., head of the Conservation Department of Maryland, on or before the 4th day of October, 1927.

Albert S. J. Owens, Judge of the Baltimore City Court.

IN BALTIMORE CITY COURT

DOCKET ENTRIES

28th September, 1927.—Copy of the Order of Court sent to the Sheriff to be served on Swepson Earle, Conservation Commissioner. "Copy of the within Order of Court served on Swepson Earle, Conservation Commissioner and Head of Conservation Department of the State of Maryland on the 29th day of September, 1927, in presence of Adam S. Buck."

15th October, 1927.—Appearance by attorneys for the Respondent.

IN BALTIMORE CITY COURT

ANSWER—Filed Oct. 15, 1927

To the honorable the judge of said court:

The answer of Swepson Earle, Conservation Commissioner of Maryland, defendant in the above entitled cause, to the petition of Ivy L. Leonard and Thomas B. Leonard, [fol. 27] co-partners trading as I. L. Leonard & Company, against him in this Court exhibited, respectfully shows:

This respondent, reserving all manner of exceptions to said petition for its manifold errors, irregularities and improper statement of facts, for answer thereto, or so much thereof as he is advised it is material for him to answer, answering says:

1. That said petition, and each and every paragraph thereof, are bad in substance and insufficient in law.

2. That said petitioners have not stated in their petition, or in any paragraph thereof, such a case as entitles them to the relief prayer.

3. This respondent admits the allegations of the first paragraph of said petition.

4. Answering the second paragraph of said petition, this respondent denies that any action taken by him in this case has prevented or will prevent the petitioners from using any of their property for the packing of oysters, or that the said petitioners will suffer irreparable loss, injury and damage, of a nature, kind and extent that cannot be certainly determined, or that they will suffer loss, injury and damage of any kind whatsoever by reason of any action of your respondent.

5. Your respondent denies the allegations of the third paragraph of said petition.

Further answering said paragraph, your respondent alleges that according to the reports submitted by the petitioners to the Conservation Department, as required by law, for the oyster packing season of 1926-1927, only 2% of all the oysters shucked in the establishment of the petitioners during said season do not come from the waters of the State of Maryland; and that during the oyster packing season of 1925-1926, only 1-3 of 1% of the oysters shucked in the establishment of the petitioners were oysters from States other than the State of Maryland; that in Somerset County, Maryland, the quantity of oysters from the State of Virginia shucked and packed by packers and canners in said County approximately 16% (and not, as alleged in said third paragraph of said petition, 50%) of [fol. 28] all the oysters shucked and packed in said County.

6. Your respondent admits the allegations of the fourth, fifth, sixth and seventh paragraphs of said petition.

7. Answering the eighth paragraph of said petition, your respondent denies that Chapter 119 of the Acts of 1927,

embraces two subjects, and, on the contrary, avers that the said Act embraces but one subject, namely, the issuance of licenses for the packing of oysters.

Further answering said paragraph, your respondent admits that said Act of 1927 provides that the Conservation Department of Maryland is charged with the duty of issuing the licenses thereunder, whereas, under the Section, of which the said Act of 1927 is amendatory, the license was issued by the Clerks of Court of the respective Counties of Maryland, and the Clerk of the Court of Common Pleas of Baltimore City.

8. Your respondent denies the allegations or implication of the ninth paragraph that the said Act of 1927 embraces more than one subject, and admits that under the said Act the license to pack oysters shall be in the nature and form of a contract between the State of Maryland and the applicant, upon the terms set forth in said paragraph.

9. Your respondent denies the allegation of the tenth paragraph that no person or department of the State is by said Act or by law of the State designated, empowered or authorized to execute any such contract, but on the contrary, avers that the power to execute said contract is clearly vested in the Conservation Commissioner of Maryland under the laws of the State.

10. Your respondent admits the allegations of the eleventh paragraph of said petition, but avers that the applicability of the Act to shells from oysters from other States and the shells of oysters from oyster bottoms leased by the State of Maryland to oyster planters, does not in any away affect the validity of said Act.

11. Your respondent emphatically denies the allegations [fol. 29] and conclusions of law set forth in the twelfth paragraph of said petition.

12. Your respondent emphatically denies that the said Act of 1927 is in violation of any provision of the Constitution of the United States and of the Constitution of the State of Maryland, and also specifically denies that the said Act is in violation of any of the provisions of the Constitution of the United States and of the Constitution of

the State of Maryland quoted and referred to in said paragraph.

13. Your respondent denies the allegations and the conclusions of law set forth in the fourteenth and fifteenth paragraphs of said petition.

14. Your respondent denies the implication of the sixteenth paragraph of the petition that the said Act embraces two subjects, and avers that all of the provisions of said Act are valid and constitutional.

15. Your respondent admits the allegations of the seventeenth paragraph of said petition.

16. Answering the eighteenth paragraph of said petition, your respondent admits that he has prepared a formal contract in the nature of a license, to be signed by the applicant for a license, as therein set forth, but denies all of the other allegations and conclusions of law set forth in said paragraph.

17. Answering the nineteenth paragraph of said petition, your respondent denies that any part of the Act is void or unconstitutional.

18. Your respondent denies the conclusions of law and allegations set forth in the twentieth paragraph of said petition.

19. Your respondent denies the allegations and conclusions of law set forth in the twenty-first paragraph of said petition, although your respondent does not intend thereby to question the jurisdiction of this Court to determine the issues raised by these proceedings.

And finally, your respondent says that all the allegations of fact and conclusions of law in said petition not herein specifically admitted or denied, are hereby denied.

[fol. 30] And having fully answered said petition, this respondent prays that the case may be dismissed and that the plaintiff be required to pay the costs.

And, as in duty bound, etc.

Thomas H. Robinson, Attorney General, R. H. Archer, Asst. Attorney General, Henry H. Johnson, Attorneys for Respondents.

Affidavit Annexed to the Answer

STATE OF MARYLAND,
City of Baltimore, To wit:

I hereby certify, that on this 15th day of October, 1927, before me, the subscriber, a Notary Public of the State of Maryland, in and for Baltimore City, personally appeared Swepson Earle, Conservation Commissioner, and made oath in due form of law that the matters and facts set forth in the aforegoing answer are true to the best of his information, knowledge and belief.

Witness my hand and notarial seal.

Harold Smith Kolner, Notary Public. (Seal.)

Issue joined (short) on the demurrer.

IN BALTIMORE CITY COURT

DEMURRER TO ANSWER

Demurrer on Behalf of the Plaintiffs to the Answer of the Defendant Filed the 18th Day of October, 1927

To the honorable the judge of said court:

The plaintiffs in this case demur to the answer of the defendant filed in this proceeding, and for grounds of demurrer say:

First. That the same is not sufficient in law.

[fol. 31] Second. That nothing is alleged in said answer which is a ground for denying the prayer of the petition filed by Plaintiffs in this case.

Third. That said answer fails to disclose any reason why the writ of mandamus should not issue by this Court as prayed in plaintiffs' petition.

V. Calvin Trice, William L. Rawls, Attorneys for Petitioner.

Issue jointed (short) on the demurrer.

IN BALTIMORE CITY COURT

DOCKET ENTRIES

18th October, 1927.—Appearance of William L. Rawls as attorney for the Plaintiffs.

25th October, 1927.—Appearance of Harry C. Dashiell as attorney for the Petitioners.

Stenographic transcript filed the 4th day of November, 1927.

Tuesday, October 25th, 1927.

The above entitled matter came on to be heard before his Honor, Judge Albert S. J. Owens, on Tuesday, October 25th, 1927, at three o'clock in the afternoon.

Messrs. V. Calvin Trice and William L. Rawls appeared in behalf of the Petitioners.

Messrs. Henry H. Johnson and Robert H. Archer appeared in behalf of the Respondents.

Argument thereupon followed until the hour of adjournment, at which time an adjournment was taken until Wednesday, October 26th, 1927.

[fol. 32] Wednesday, October 26th, 1927.

Pursuant to adjournment the Court met in the above entitled matter at twelve o'clock noon.

(Argument followed until 12.40, at which time a recess was taken until 1.40 P. M.)

IN BALTIMORE CITY COURT

COLLOQUY BETWEEN COURT AND COUNSEL

(Argument continued.)

(The Court, orally:) I understand that some additional papers have to be filed to these pleadings, in other words,

as the case stands, the ruling on the demurrer cannot properly be made. Now, I am prepared, if you gentlemen want me to do so, to decide the law question presented to me here today, but I will only do so with the understanding that this case when it goes to the Court of Appeals does not go in an unfinished form, and goes down to the Court of Appeals by amendment of the proceedings wherever necessary, or additions to them, in such a way as not to let the Court of Appeals think that I decided a case before it was at issue. You gentlemen are going to take care of the pleadings?

(Mr. Archer:) As I understand from Mr. Rawls—if I am not right, let him correct me—the difference is as to the percentage of oysters that come from out of the State.

(The Court:) If I am to decide the question you people must fix these papers so that the question I decide is a matter of law, and if you cannot do it among yourselves I am not going to decide it at all.

(Mr. Archer:) It is just with reference to those percentages. The only question of fact is as to those percentages of out of the state oysters. Those percentages on behalf of the State are based on actual figures which were turned in by the packers to the Conservation Department. We stand on those. I told Mr. Rawls that at his convenience he could examine the Department's records, and if we had made a mistake in figuring the percentage we could correct that in the Answer. That is all I can agree to.

{fol. 33} (The Court:) I do not want this case taken down to the Court of Appeals on some question of pleading, and I look to counsel to prepare the pleadings in the case so that the law question alone is presented.

(Mr. Archer:) The only thing that could be changed would be those percentages.

(The Court:) Then you must provide me with some finding of fact or else eliminate it in some way.

(Mr. Rawls:) That is right, we will do that, your Honor.

Memorandum Opinion

(The Court:) Now, gentlemen, I studied this question last night and, of course, in one night it could hardly be expected that I would be able to get as sound a conclusion on the question as you competent and distinguished gentlemen who have presented it here to me did, but I did form an opinion, and I started out to write an opinion, but when I realized that if I were to try to do that, that in order to pay proper attention to the very serious questions involved, it might take me so much time, with the many things I have to do here during the day, that I might delay my opinion for a longer period of time than a Judge ought, with reference to the matter that affects very seriously the operation of the State Government. And therefore I concluded to jot down some notes and then to attempt orally to give my reasons to you.

Of course, you gentlemen know that a man who has been living all his life in the City of Baltimore and going from one end of the State to the other in the discharge of his professional duties, and therefore meeting everybody who is anybody from one end of the State to the other, forms a very extended acquaintance and knows nearly everybody who in any way could come before you to practice law both in your City and your State, and it is one of the pleasures and one of the embarrassments of this office to which I have been elected that I have to decide questions between personal friends, so to speak, and yet the mere fact that I realize that I can still retain their personal friendship, no matter how I decide those questions and how sorry they may feel for me, gives me a certain amount of independence in the matter and allows me to render a decision without hesitation.

[fol. 34] In thinking over this matter it occurred to me that when Columbus sailed on his voyage of discovery there was extant a map showing that west of the Azores was an enchanted territory terminated by the world's end at which the waters of the Atlantic poured into a bottomless pit. I have in my library a reproduction of this map showing the mountains of loadstone that would pull nails out of vessels, waters filled with marine monsters and the rushing waters pouring into this bottomless pit. It is a very

striking and alarming picture. The credulous world at that time believed this to be true and feared to investigate or explore. Columbus did not, and he found it false. When we are confronted with a novel situation we are naturally inclined to be apprehensive.

There is no doubt that the act under consideration is a novelty and experiment in the field of legislation. My attention has not been called to any legislative precedent for this Act, except perhaps the slight reference made a few minutes ago to the laws of the State of Texas, which have not actually been called to my attention but which I assume are somewhat similar.

The fathers who framed the Constitution of this State and fathers who framed the Constitution of the United States as well were apprehensive of the tendency of Government when vested with arbitrary powers to over-ride or ignore the rights of the individual citizen. To absolutely insure the protection of the individual citizen you will find attached to the State Constitution our Declaration of Rights and the first ten amendments attached to the Constitution of the United States.

While, therefore, under the policy of our law the reserved rights of the individual must be protected, still we must not be frightened, in our effort to do this, into the other extreme of so tying up the administration of the State Government, which is to be administered for the benefit of all, that it be prevented from functioning in a situation of great moment.

In the Charter granted by King Charles to Lord Baltimore the inhabitants of Maryland were granted the common Right of Fishery, and by reason of our surpassing water facilities this Common Right of Fishery is one of the most [fol. 35] valuable heritages of our people. Throughout the years large fortunes have been made from its prosecution, but above and beyond all by reason of the courage and intelligence required of those whose vocation it has been and is, it has developed a type of citizenry from whose ranks men have sprung who have held high positions in the State and Nation, who have helped to mold our institutions, and have been of those upon whom the people relied in critical periods of our history. They were tried and not found wanting.

It is natural, therefore, that the oyster industry, a part of this common Right of Fishery, should have been, as it has been the subject of continuous legislation. And the Act now under consideration is a part of what was done with reference thereto at the last session of the Legislature of Maryland. Now, what is the Act that the Legislature passed. They passed a law, Chapter 119 of the Acts of 1927, An Act to Repeal and Re-Enact with Amendments Section 91 of Article 72 of the Code of Public General Laws of Maryland, Title "Oysters," sub-title "Packing Oysters," and to add a new section to Article 72 of the Code of Public General Laws of Maryland, title "Oysters" sub-title "Packing Oysters," to be known as 91-A to follow immediately after section 91 in said Article.

Then there is a preamble to that Act:

"Whereas, the demand for oysters is constantly increasing and the oyster bars and rocks of the Chesapeake Bay and its tributaries are showing such great depletion that constructive legislation is necessary to preserve and rehabilitate such depleted areas, and

Whereas, a Seafood Committee, consisting of representatives from each tidewater county, was appointed by Governor Albert C. Ritchie, to investigate and recommend remedial legislation to increase the oyster supply of Maryland, among which was the recommendation that the State should reserve ten per cent. of all shells made by the oyster packing houses to be planted upon reserved and seed areas; therefore;

Section 1. Be it enacted by the General Assembly of Maryland, That Section 91 of Article 72 of the Code of [fol. 36] Public General Laws of Maryland, title "Oysters," sub-title "Packing Oysters," providing for licensing of oyster packers be and is hereby repealed and re-enacted with amendments,"

and so forth.

The provisions of the Bill in its entirety everyone of you here know. The objection is made that this bill violates the provisions of the Constitution of the State of Maryland and the provisions of the Constitution of the United States. As a starting point the Relators charge that the Bill em-

braces two subjects, one subject providing for the issuing of licenses for the packing of oysters, and the other or second subject, a provision that the license to pack oysters shall be in the nature and form of a contract.

In looking at the Act I find by its very terms that that objection cannot be maintained, for the reason that the Act itself provides after the statement that those who desire to pack oysters shall take out a license, "such license to be in the nature and form of a contract between the State of Maryland, the entire license to be in the nature and form of a contract between the State of Maryland and the applicant and shall provide for the payment of a license fee of twenty-five dollars, and then the other provision. Manifestly, therefore, this license was entire and must be taken out in a way that would include within the license the contract for 10% of shells as provided by the law.

Now, when we come to that contract we are met by very cogent reasoning and very able argument, and, as I said at the outset, I was very apprehensive about the matter at first because I thought I saw some very great and grave inequalities that might be possible under the Act. But when I came to consider the Act I realized that those inequalities really could not be, that the words in the contract at least 10% could not mean that it would ever be within the power of the State Conservation Department to exact more than 10%. At first I thought it could. But I was certain after examining the Act critically last night that that could not be the case. Then I thought there were grave inequalities that might be practiced by the Conservation Department on people differently located. But I realized that that was a [fol. 37] matter of the administration of the law, and if the State Department did do anything that was unjust the Courts would immediately stop that irregular and improper and one-sided attempt to operate under the law. Then I came to the consideration of what is the necessity, the real reason for this Act, and I came back to my own knowledge of the subject matter. I realized after considering the matter that when this Act was passed imposing upon the packer this contribution of not less than 10% of his shells that the reason of it consisted in the fact that the packer is the certain reservoir of the shells needed by the State

and that the only way to get shells in quantity sufficient for the purpose of the reconstruction and rehabilitation and renewal of this priceless heritage of our people was by getting the shells from that source. There was no other way in the world that we could within the limits of the State of Maryland get shells in sufficient quantity for this very urgent and necessary situation except at prohibitive prices and therein I find the reason of the law. I find that the purpose and object of the Act did have a direct relation to the subject matter, which is the beginning point of all sound legislation, as I understand it.

Now, I am confronted by the argument, "You cannot do this, you cannot take these shells of ours willy-nilly away from us. That is a wrong thing, because you are confiscating private property for a public use and you have no right to take private property for a public use without just compensation." Well, I do see some just compensation. I say that no man has a right to conduct the business of an oyster packer or to continue to conduct the business of an oyster packer in the State of Maryland unless he complies with the law under which he is licensed, and does what the law says he shall do, and the law says unless you are willing to give the State 10% of your shells or pay their equivalent in money, if the State does not need them for this great reclamation purpose which they propose to carry on, you cannot have a license, to conduct business. And a man comes along and says, yes, I am perfectly willing to do that, and he signs an agreement and he gets his license, and as a consideration therefor he is permitted to conduct the business of an oyster packer within this State.

[fol. 38] Now, in my opinion, he gets under the theory of the law just compensation, or at least he accepts it because he goes on with his business.

Now, I am again met with the argument that these oyster shells do not belong to us or do not belong to the State because a portion of these oyster shells come from other States of the Union, and that therefore when we confiscate, so to speak, using the language of the relators here, when we confiscate these shells we are taking shells that never

were a part of that common heritage to which I have referred. But you must remember, gentlemen, that at the time of appropriating these shells to the rehabilitation of the oyster territory they are no longer the shells of the people in the State from which they came, but they are within the limits of the State of Maryland and are part of the personal property of the gentlemen who are conducting this business within the State of Maryland under a license from the State and the shells are to be used for the welfare primarily of the people who take the oysters and secondly for the benefit of the relators.

I do not think it is necessary to go into any extensive discussion as to whether or not it is an occupation tax or what it is. I do not think it makes any difference really what you call it. I think under the peculiar circumstances of this case and the conditions surrounding the industry that the provision of the Act are in no sense unreasonable. They are in no sense unjust and I think if in the course of the operation of the law, as I said before, any great injustice is done to any person engaged in the business the Courts of this State stand ready to fully protect them.

I have not gone into all the questions. I mean I have not undertaken to pass upon all the questions referred to in your discussion of the case, but holding these views, and finding no positive provision of either the State or Federal Constitutions that may be said in any manner to be violated by this Act, I will overrule the demurr*ed* filed by the relators in this case and when the papers are properly fixed up I will then dismiss your bill so you can take an appeal. I want you to understand that I have passed upon this case [fol. 39] as a mandamus proceeding because I would not think for a single moment that distinguished counsel like yourselves have not already determined that this is a proper case for mandamus.

(Mr. Rawls:) Well, I think that is uncontested, as a matter of fact.

(The Court:) I understand, but yet at the same time I have treated it as a mandamus case because you gentlemen treated it as mandamus case.

(Mr. Rawls:) Your Honor, just one word about the record. I think there are only two matters that I am concerned with, that they are the portion of the oysters from

out of the State—it is conceded in Somerset County that is 16½%. I would like to go over the figures of the Conservation Commissioner and if I find that they are in accord with my information I will accept those figures. If on the contrary they are not in accordance with my information and I cannot get any agreement with my brother as to what the percentage *is* may be, it is conceivable that I would want to take a little testimony just on that point. I would also want to get the facts regarding the leased beds in the record. I cannot imagine that there would be any difference between my brother and myself and we should be able to stipulate on that. I have got the information.

(The Court:) I think there cannot be any mistake as to those figures, and I think you can amend your petition and answer or whatever is necessary by putting those figures in those papers.

(Mr. Rawls:) I should think so.

(The Court:) And that would bring up the question of law which I understand I was to decide and which I have decided and I am sorry I could not decide it both ways.

(Mr. Rawls:) If your Honor will leave the matter open——

(The Court:) You gentlemen can fix the papers up, yes.

[fol. 40] IN BALTIMORE CITY COURT

FINAL ORDER DISMISSING PETITION—Filed Dec. 22, 1927

This case having come on for hearing upon the *the* demurrer, of the plaintiffs to the answer of the defendant and the case having been fully considered, it is ordered by the Baltimore City Court this 22nd day of December, 1927, that the said demurrer of plaintiffs to the answer of the defendant be and the same is hereby over-ruled and it being stated in open Court by Counsel for the plaintiffs that the said plaintiffs intended to stand upon their demurrer to the said answer of the defendant, it is further ordered that the said petition of the plaintiffs be and the same is hereby dismissed with costs to the defendant.

Albert S. J. Owens.

IN BALTIMORE CITY COURT

DOCKET ENTRY OF JUDGMENT

22nd December, 1927.—Judgment on the Plaintiffs' Demurrer to the Answer of the Defendant in favor of the Defendant for costs.

IN BALTIMORE CITY COURT

ORDER OF APPEAL AND AFFIDAVIT—Filed Dec. 27, 1927

Mr. Clerk:

Please enter an appeal in the above entitled case to the Court of Appeals of Maryland on behalf of the Plaintiffs from the final order and judgment of the Court, dated December 22, 1927, dismissing the petition of plaintiffs.

William L. Rawls, V. Calvin Trice, Attorneys for Plaintiffs.

[fol. 41] Affidavit of the Plaintiffs Annexed to the Aforegoing Order of Appeal

STATE OF MARYLAND,
Dorchester County, ss:

I hereby certify that on this 23rd day of December, 1927, before me the subscriber, a Notary Public of the State of Maryland, in and for Dorchester County, personally appeared Thomas B. Leonard, one of the plaintiffs in the above entitled cause, and made oath in due form of law, on behalf of said plaintiffs, that the appeal to the Court of Appeals in the above entitled case is not taken for the purpose of delay, and he further made oath that he is duly authorized to make this affidavit on behalf of said plaintiffs.

Cornelia M. Anderson, Notary Public. (Seal.)

Appellants' costs, including Record to Court of Appeals, $30.65; Appellee's costs, $6.85.

Test:

George Carey Lindsay, Clerk of the Baltimore City Court.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 42] In Court of Appeals of Maryland, January Term, 1928

No. 61

Ivy L. Leonard and Thomas B. Leonard, Copartners, Trading as I. L. Leonard & Company,

vs.

Swepson Earle, Conservation Commissioner of Maryland, Head of the Conservation Department of the State of Maryland

Opinion—Filed April 19, 1928

Chief Judge Bond delivered the opinion of the Court.

The question raised on this appeal is one of the constitutionality of an Act of the General Assembly of 1927, Chapter 119, adopting a plan for the conservation of the supply of oysters in the waters of the State. Upon recommendation of a special Seafood Committee of representatives of the tidewater counties, appointed by the Governor to investigate and recommend remedial legislation to increase the supply, which has been decreasing for some years despite the adoption of previous conservation measures, an attempt is made in this Act to provide for returning to the bottoms after each season of oystering, a quantity of shells to which the oyster spat may attach itself for its growth. In the past, so long as oyster shells were waste, having no uses for which they could be sold, it was the practice of the packers at whose hands the shells were removed from the oysters and accumulated, to dump a large portion of their accumulations each year into the State waters; and this is regarded as having been an aid in the development of new [fol. 43] oysters which was necessary to the continuation of any large supply on the bottoms, and which can best be secured for the future by continued dumping of shells. In the arguments, it has been stated that the method of returning shells to the bottoms is one resorted to in other States, especially in those bordering on the Gulf of Mexico. Shells have become salable for various commercial uses now possible, and the packers have ceased to dump them

into the waters; and the present legislation seeks a continuation of the method by law. The plan devised in the Act is to issue to the packers in the State special licenses to engage in their occupations upon their signing, and only upon their signing, agreements to surrender to the State Conservation Department ten per cent of the shells from oysters shucked by them in each coming season, or the equivalent in money for the purchase of shells or seed oysters elsewhere. The full statutory provision, out of which the questions arise on appeal, is this:

"It shall be unlawful for any person, firm or corporation having a fixed place of business, buying oysters and employing labor to prepare them for market to engage in the business of buying, selling, marketing, packing or canning oysters without first taking out a license to engage in such business by application to the Conservation Department of Maryland. Where any such person, firm or corporation operates more than one house for the buying, selling, marketing, packing or canning of oysters, a separate license shall be obtained for each house in which oysters are shucked or otherwise prepared for market; such license to be in the nature and form of a contract between the State of Maryland and the applicant and shall provide for the payment of a license fee of twenty five dollars, and shall further provide that the licensee must turn over to the State of Maryland at least ten per cent of the shells from the oysters shucked in his establishment for the current season, said shells to be removed on or before the twentieth day of August of said season; or at the discretion of the Conservation Department its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the close of the season. The Conservation Department shall notify each packer or canner on or before the said first day of May whether it is its intention to take the ten per centum of the shells from oysters shucked as aforesaid, or its equivalent in money. Said license shall have effect from the first day of September in the year in which it may have been obtained until the twenty-fifth day of April, inclusive, next succeeding."

The uncertainty as to the amount of shells to be surren- [fol. 44] dered in the phrase "at least ten per cent," is cor-

rected by further provisions which restrict the amount to ten per cent, and we understand that no defect is found in the Act as a whole because of this expression.

The appellants have been packers of oysters in Dorchester County, and on August 30, 1927, after the Act had become effective, made application for a license to carry on their business during the oystering season to begin on September 1st following, but, contending that the attached condition of a promise to turn over part of their shells or the money equivalent would be unconstitutional, refused to sign the agreement to make the surrender. Having then been refused a license, they filed their petition for a writ of mandamus to compel its issue to them free of the agreement or condition, the appellee filed an answer, the appellants filed a demurrer to the answer and it was overruled. And the appeal is from the overruling of the demurrer. There is no question of procedure raised.

Some additional facts are presented by the papers in the case. Oysters are customarily brought to some of the Maryland packers from the waters of Virginia and New Jersey, as well as from Maryland waters; the amount has varied somewhat in past seasons, partly according to location of the packing houses, the appellants having, for instance, received two per cent of their oysters from outside waters in the season of 1926 to 1927, and one third of one per cent in the season of 1925 to 1926, while approximately sixteen per cent of the oysters packed in the border county of Somerset came from Virginia waters. It appears also that some of the oysters to be packed by the appellants would, according to the natural course of their business, come from rented or leased bottoms in Maryland.

The objections urged on the appeal are that the condition attached to the granting of the licenses under this provision is contrary to requirements of the constitutions of Maryland and the United States, in that it would involve a [fol. 45] taking of private property of the packers without compensation, and an unlawful delegation of legislative power in directing that the Conservation Department shall determine whether shells or the equivalent in money shall be required from particular packers; would deny to the packers affected the equal protection of the laws in singling them out as a limited class for the exaction, and also in-

volve a taking of private property without compensation in requiring the packers to keep and store the required ten per cent of their shells for the Department until it removes them.

The objections are to be answered for the most part, we think, upon consideration of these facts and principles: that the oysters in the State waters are originally the property of the State, that the State may subject dealing in them to limitations and conditions in the public interest, that it is in the prosecution of the business of the packers that the State supply is chiefly drawn upon and its exhaustion threatened, and that the condition to be attached to the privilege of carrying on this occupation is a safeguarding one, in substance and effect that the packers shall aid in preventing or repairing the exhaustion which the exercise of the privilege may cause. The condition, so viewed, appears to be a reasonable one, well adapted to further the public interest, and more especially the interest of the packers themselves, and we do not find any of the constitutional prohibitions to be applicable to it.

That oysters, as well as fish and game generally, are originally the property of the State, that is, of the people in their sovereign capacity, has been pointed out in previous decisions of this court. No individual has any prop- [fol. 46] erty rights in them other than such as the State may permit him to acquire; and even when they are taken and reduced to possession by an individual, his ownership may be regulated and restrained by appropriate legislation enacted for considerations of State or the benefit of the community. "In other words, the cases hold that the question of enjoyment in this field is one of public policy and not of private right." Stevens v. State, 89 Md. 669, 672; Hughes v. State, 87 Md. 298; Tyler v. State, 93 Md. 309, 311; Windsor v. State, 103 Md. 611, 618. Such "things feræ naturæ belong to the 'negative community,' in other words, are subject to the absolute control of the State, which, although it allowes them to be reduced to possession, may at its will not only regulate but wholly forbid their future taking." Ohio Oil Co. v. Indiana No. 1; 177 U. S. 190, 208. And limitations and conditions on private enjoyment need not be expressed as reservations of title similar to those which might be used by private grantors of

property conveyed, but would regularly be such as would result merely from legislation touching the subject. Dize v. Lloyd, 36 Fed. 651; McCready v. Virginia, 94 U. S. 391; Geer v. Connecticut, 161 U. S. 519; Cornfield v. Coryell, 4 Wash. C. C. 371; Freund, Police Power, 419, 422, 447; Comm. v. Hilton, 174 Mass. 29; Brooks v. Tripp, 135 N. C. 159; People v. Clair, 221 N. Y. 108; People v. Monterey Fish Products Co. 195 Cal. 548. And cases reviewed in notes: L. R. A. 1916 C 338; Ann. Cas. 1917 B 953; 32 A. L. R. 337. Accordingly this court has upheld various conditions, regulations and prohibitions for the conservation of such State property; and it has upheld previous measures imposing license or occupational taxes on oyster packers as a class to meet in part the burden of conserving the supply [fol. 47] upon which they draw. And as Judge Boyd said, in his opinion in State v Applegarth, 81 Md. 293, those exactions might be considered in the nature of fair compensation from the packers. "Such legislation on this particular subject," he said, "might well be justified on the ground that the State as owner of the oysters is entitled to a reasonable and fair compensation for them, and it may not be deemed just or wise to impose all the burden on those who oftentimes undergo great hardships and suffering catching them; and therefore those engaged in packing and canning them are called upon to contribute their share of the compensation. If the State is not to profit by sales of its property, it should at least be protected from any loss in caring for it, and those engaged in the oyster business might justly be required to contribute their proportion of the cost and expense of preserving them." And see Appelgarth v. State, 89 Md. 140. Such license fees, or occupational taxes may be graduated in amount according to the volume of business done in one establishment and another, and may have as their objects the furtherance of various public interests. Ruggles v State, 120 Md. 553, 561; State v. Shapiro, 131 Md. 168, 173.

As has been argued for the appellees, the present act may be viewed as imposing a license or occupational tax, in that it makes its demand upon persons who are to engage in a particular occupation, and the demand is to be measured by the volume of business of each one affected. And it is appropriately made upon those persons because it has

as its object the repair of damaging effects of the pursuit of their occupation. It seeks its ultimate purpose, the repair, more directly than does the usual occupational tax in demanding a contribution of tangible property rather than of money with which the property might be procured. State v. Applegarth, supra. The material which will be needed for the repair is material which will be accumulated by the packers themselves, and a contribution in kind rather than [fol. 48] one in money seems to be a direct, convenient arrangement; and it would seem to involve no further reach of governmental power. It seems to us, however, that the act may be accurately described as establishing merely a condition upon which the oyster supply of the State may properly be drawn upon and dealt in, or as fixing a necessary incident of the exercise of the privilege sought. The greater part of the burden of conservation, undertaken largely for the benefit of the packers, for the preservation of their livelihood, indeed, is to be borne by the State at large, and what is demanded of the packers as the condition of their license, may be regarded as a measure of co-operation, one which they are peculiarly equipped to contribute. There is some novelty in exacting a contribution of tangible property, even as a measure of co-operation for the private individual's benefit, or as the condition of a privilege, but novelty alone does not, of course, render it invalid. State v. Applegarth, supra. The powers of the Legislature are not derived from grants in the constitution of the State, or, indeed, from any classifications made use of in discussion of exercises of power; plenary power in the Legislature for all purposes of civil government is the rule, a prohibition to exercise a particular power is an exception, and can be founded only on some constitutional clause plainly giving rise to it. Painter v. Mattfeldt, 119 Md. 466, 472; Kenneweg v. Allegany County, 102 Md. 119, 122; Marmet v. State, 45 Ohio St. 63, 70; Nichols, Eminent Domain, 56. The constitutional prohibition against taking property without compensation, in Article 3, section 40 of the Maryland Constitution, and that against the deprivation of property without due process of law in the Fourteenth Amendment of the United States Constitution and Article 23 of the Maryland Declaration of rights, (all of which have the same meaning and effect in reference to an exac-

tion of property, Harness v. C. & O. Co., 1 Md. Ch. 248, 252), have, as it seems to us, no bearing on an exaction made as the reasonable price or condition of a license. They are not designed to prohibit an exaction of property under any and all circumstances whatever except by con- [fol. 49] demnation proceedings to secure payment of the value in money. And a property contribution as the price or condition of a license or privilege sought, while unusual, is not unprecedented. In the case of Baltimore v. White 2 Gill 444, concerning a grant of the privilege of erecting a wharf off the applicants' property in Baltimore Harbor, at a time when under the law special permission for it had to be obtained from the Mayor and City Council, the court had to consider a condition imposed that the owners dedicate part of it to the public. And the court said in its opinion, "as the case is now before us, we are bound to presume that the extension, as proposed by the Olivers, could not, in the judgment of the city authorities have been granted without detriment to navigation unless the injuries resulting from it were counteracted by the great facilities afforded to navigation by the surrender to its uses of the exterior margin of the improvement in the shape of a public wharf. If the city authorities believe that the unconditional grant of the power of improvement proposed by the Olivers would be ruinous to the navigation of the port of Baltimore, but that its effects would be wholly obviated by the facilities to navigation afforded by the wharf at the southern side of the improvement being dedicated to the use of the navigating public, were they not authorized, nay were they not bound, to withhold their assent, unless such a dedication were made? Or suppose the Olivers' original application had thus proffered the dedication, ought the corporate authorities have withheld their assent? We think not." And that exaction seems to be the same in principle as the present one. The opinion did not mention any constitutional objections, but the same prohibitions were then in force, although not yet expressed in the written constitution. 1 Blackstone, Comm. 139; Hepburn's case, 3 Bland 98; Compton v Susquehanna R. R., 3 Bland 390; Hamilton v. A. & E. R. R. 1 Md. Ch. 108, 109; Harness v. C. & O. Co., supra; New Central Coal Co. v. Georges Creek Co., 37 Md. 537, 559. An exaction of private property rights

was made as a condition to the grant of a privilege which could not be exercised except with the permission or license of the public authorities, acting in the interest of all the [fol. 50] citizens, and it was considered not only lawful but one which it was the bounden duty of the authorities to make. Compare cases reviewed in note Ann. Cas. 1912 A. 490; 1 Blackstone Comm. 358; Galoway v. State, 139 Tenn. 484.

The constitutional prohibitions, as is well known, are levelled against special exactions which will leave the individual possessors subjected to unequal deprivations and public burdens without regard to compensatory benefits. Re Dorrance Street, 4 R. I. 230, 245; Nichols, Eminent Domain, 49. They are levelled against exactions which as Chancellor Johnson said "would be at war with the great principles of natural justice." Hamilton v. A. & E. R. R. supra. They are not concerned with exactions made as reasonable conditions or in exchange for privileges, carrying full compensation, which might be withheld except upon such co-operation and might be declined by the individuals if dissatisfied with the terms. See Lewis, Eminent Domain, sec. 4; Mills, Eminent Domain, sec. 1; Moale v. Baltimore, 5 Md. 314, 320.

It may be added that as the State might exact contributions of money sufficient to buy the shells from the packers, a construction of the constitutional prohibitions making them apply to prevent stipulations for surrendering the shells, would give those prohibitions the practical effect of denying the propriety of exacting directly a contribution which is free from objection when exacted indirectly; it would be reading the constitutions to insist upon the form without any objection to the substance.

So far we have discussed the objections as if the shells to be contributed were all the full property of the packers to be licensed, or as if all were obtained from other than State bottoms. Some packers would, apparently, have no such shells in their accumulations, and some have quanti- [fol. 51] ties which are, perhaps, negligible; but packers in the border counties would have considerable ingredients of these, and we have considered the case as if some of such outside shells might be required under the Act because they would enter into the basis of calculating the ten per cent.

But the fact remains that the greater part of the accumulations, at least, will in every instance consist of shells from State bottoms, and as to these the State would retain whatever ownership or rights might result from its conservation enactments, and in receiving those shells would in effect, merely repossess them. The right to do so, under the authorities already cited, would be one of the conditions of the privilege beyond any question, we think.

The alternative exaction of a contribution in the money equivalent, at the discretion of the Conservation Department, is objected to because of the difference it authorizes between demands upon one packer and another, and because of the delegation to the department of the power to make the election and fix the money equivalent, which is regarded as an essentially legislative and non-delegable power. As the Act contemplates an election between equivalents only, it does not impose or contemplate any inequality in the amount of the exaction. The packers will hold the shells for conversion into money at the market price, and the alternative to surrendering shells to the department in kind is, in the final analysis, nothing more than paying over to the State so much of the sales price in advance of sale—or it may be after actual sale. The burden is a slight one, no greater than other burdens necessarily imposed on individuals in practical working plans for collecting taxes, as, for instance, the burden imposed upon warehousemen to advance the owners' taxes on goods deposited, as that on retailers of gasoline and oils to collect and pay the taxes on purchases from them. Hannis Distilling Co. v. Baltimore, 114 Md. 680, 681. Pierce Oil Co. v. Hopkins, 264 U. S., 137. And we think it is to be classed with those necessary burdens, and is too slight to justify stamping the whole beneficial scheme as one involving unconstitutional discrimination among packers. And especially does this [fol. 52] appear true when it is remembered that what is now being considered is the constitutionality of a condition upon a privilege, in a scheme for the packers' own benefit, one which appears to be about as practical and economical a scheme as can be devised.

And in the delegation to the department of power to make the election we find nothing contrary to the provisions of the constitution. It is inaccurate to regard the department

as being given power to fix the price; the price is to be the market price, fixed by the market; and if a packer of whom the money is demanded cannot agree on the market price he can be required to pay only that which shall be judicially ascertained as such, no price can be arbitrarily fixed for him. And for the choice between shells and money, there is little left to be settled by the department. It obtains nothing but shells and seed oysters in the end, and is only to determine where it is advantageous to obtain them for the needs to be met; the needs control the election; it would be wholly impracticable to settle by legislation the election required by the many and varied considerations which would enter into the work of planting about such great areas of bottom; and unless the election could be committed to the agency doing the work, the plan of election must be abandoned; and that we think the constitution does not require. The plan of obtaining shells at the localities near the planting is a reasonable and economic one, in the interest of the packers as well as of all others who deal in oysters, and without any substantial detriment to any of them. And the functions necessarily delegated to the department in charge of the work of planting is no more uncontrolled than those necessarily devolved upon other administrative agencies, and heretofore upheld by the courts. Tighe v. Osborne, 150 Md. 452, 560. Faust v. Building Assoc., 84 Md. 192. C. & P. Telephone Co. v. Board of Forestry, 125 Md. 666, 675.

The burden which might fall upon packers by requiring them to hold the shells on their premises until the department removes them seems to us an unsubstantial one, to be classed with those temporary burdens incidental to the individual's compliance with a lawful public demand, such [fols. 53 & 54] as the burden of preparing books or accounts for the assessment of taxes, entry of public officers upon private property for the purposes of preliminary surveys, seizure of milk and other merchandise for tests. State v. Mayhew, 2 Gill 487, 500. Steuart v. Baltimore, 7 Md. 500, 516. Lewis, Eminent Domain, sec. 228. The requirement would, in this aspect, seem analogous to one of the holding of garbage on private property for collection, which is sometimes a requirement against the interest of the owner of the premises. Gardner v. Michigan, 199 U. S.

325. And apart from these considerations this requirement also seems justified as a reasonable, or even necessary, part of a lawful condition attached to the privilege sought.

We conclude that there is no valid constitutional objection to the Act.

Order affirmed with costs to the appellee.

IN COURT OF APPEALS OF MARYLAND

JUDGMENT—April 19, 1928

Whereupon the following judgment of the Court was entered, to wit: "April 19th, 1928.—Order affirmed with costs to the appellee. Opinion filed. Opinion, Bond, C. J., to be reported.

[fol. 55] IN COURT OF APPEALS OF MARYLAND

[Title omitted]

PETITION FOR WRIT OF ERROR AND/OR PRAYER FOR APPEAL—Filed June 15, 1928

To the Honorable Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland:

The petition of Ivy L. Leonard and Thomas B. Leonard, co-partners trading as I. L. Leonard & Company, appellants in the above entitled case, respectfully shows unto your honor:

1. That on the 19th day of April, 1928, a final judgment and decree was duly entered by the Court of Appeals of Maryland affirming the final order, judgment and decree entered by the Baltimore City Court in the matter of a proceeding wherein said Ivy L. Leonard and Thomas B. Leonard, co-partners trading as I. L. Leonard & Company, where the plaintiffs, and the said Swepson Earle, Conservation Commissioner of Maryland and Head of the Conservation Department of the State of Maryland, was defendant, which final order, judgment and decree of the

as being given power to fix the price; the price is to be the market price, fixed by the market; and if a packer of whom the money is demanded cannot agree on the market price he can be required to pay only that which shall be judicially ascertained as such, no price can be arbitrarily fixed for him. And for the choice between shells and money, there is little left to be settled by the department. It obtains nothing but shells and seed oysters in the end, and is only to determine where it is advantageous to obtain them for the needs to be met; the needs control the election; it would be wholly impracticable to settle by legislation the election required by the many and varied considerations which would enter into the work of planting about such great areas of bottom; and unless the election could be committed to the agency doing the work, the plan of election must be abandoned; and that we think the constitution does not require. The plan of obtaining shells at the localities near the planting is a reasonable and economic one, in the interest of the packers as well as of all others who deal in oysters, and without any substantial detriment to any of them. And the functions necessarily delegated to the department in charge of the work of planting is no more uncontrolled than those necessarily devolved upon other administrative agencies, and heretofore upheld by the courts. Tighe v. Osborne, 150 Md. 452, 560. Faust v. Building Assoc., 84 Md. 192. C. & P. Telephone Co. v. Board of Forestry, 125 Md. 666, 675.

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Baltimore City Court was rendered on the 22d day of December, 1927, dismissing the petition of the plaintiffs for a writ of mandamus directed to the defendant, commanding him to issue a license to appellants to pack oysters without any obligation or duty in the nature of a contract or otherwise to turn over to the State of Maryland any oyster shells or money in lieu of shells, and that the said license should be issued to the plaintiffs as formerly issued under Section 91 of Article 72 of the Code of Public General Laws of Maryland, 1924, except that the license be [fol. 56] issued by the Conservation Commissioner instead of the Clerk of the Court. That in the petition filed by said plaintiffs against the said Swepson Earle, Conservation Commissioner of Maryland and Head of the Conservation Department of the State of Maryland, it was alleged that the said plaintiffs were engaged in the business of packing oysters in the City of Cambridge, Dorchester County, Maryland, for several years before the filing of said petition, and that they desired and intended to pack oysters in said city, county and state during the oyster packing season beginning September 1, 1927, and ending the 25th day of April, 1928; that they own in fee simple a lot of land with buildings and improvements thereon, with proper equipment for packing oysters, located in said city, county and state, of the value of several thousand dollars; that in preparation for engaging in the packing of oysters from September 1, 1927, to April 25, 1928, the plaintiffs, on the 30th day of August, 1927, filed with the defendant an application for a license to pack oysters, your petitioners having but one place for said business, or having but one house in which they engaged in said business, which was the property hereinbefore mentioned, which application was accompanied by the check of the plaintiffs for Twenty-five dollars ($25) to pay for the said license, which said application, together with the said check, was refused by the defendant because the application was not in the form prescribed by the Conservation Department of Maryland, as set forth in a letter of the defendant refusing said application, filed as an exhibit with said petition.

2. That said application of plaintiffs was refused by the defendant upon the alleged ground that the license applied

for was not in accordance with the provisions of a certain alleged Act of the General Assembly of Maryland, namely, Chapter 119 of the Act of 1927, said Act purporting to provide as follows:

[fol. 57] "It shall be unlawful for any person, firm or corporation having a fixed place of business, buying oysters and employing labor to prepare them for market to engage in the business of buying, selling, marketing, packing or canning oysters without first taking out a license to engage in such business by application to the Conservation Department of Maryland. Where any such person, firm or corporation operates more than one house for the buying, selling, marketing, packing or canning of oysters, a separate license shall be obtained for each house in which oysters are shucked or otherwise prepared for market; such license to be in the nature and form of a contract between the State of Maryland and the applicant and shall provide for the payment of a license fee of twenty-five dollars, and shall further provide that the licensee must turn over to the State of Maryland at least ten per cent of the shells from the oysters shucked in his establishment for the current season, said shells to be removed on or before the twentieth day of August of said season; or at the discretion of the Conservation Department its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the close of the season. The Conservation Department shall notify each packer or canner on or before the said first day of May whether it is its intention to take the ten per centum of the shells from oysters shucked as aforesaid, or its equivalent in money. Said license shall have effect from the first day of September in the year in which it may have been obtained until the twenty-fifth day of April, inclusive, next succeeding."

3. That it was further alleged by plaintiffs in said petition that during the packing seasons of 1925 and 1926 and 1926 and 1927 they had packed oysters not only from the natural oyster bottoms of the State of Maryland, but from the waters and oyster bottoms of other states, and that in addition to said oysters from other states than

Maryland the plaintiffs, during the said packing seasons, also packed oysters from leased bottoms in the State of Maryland.

4. It was further alleged in said petition that the quantity of oysters packed at the said plaintiffs' plant in the City of Cambridge as aforesaid, during the oyster seasons for preceding years was large, amounting in the season of 1925 to 52,714 bushels, and during the season of 1926 to 50,800 bushels; that the plaintiffs would suffer irreparable loss if they were denied a license to pack oysters in the State of Maryland.

[fol. 58] 5. It was expressly alleged and claimed in said petition that the said Act of 1927, Chapter 119, Section 1, repealing and re-enacting with amendments Section 91 of Article 72 of the Code of Public General Laws of Maryland hereinbefore set forth, was unconstitutional, null and void, in that the same was in violation of the Constitution of the United States, the said petition specifically alleging that insofar as the said Act of 1927, Chapter 119, purported to require that the license issued by the Conservation Department to any person, firm or corporation engaged in the business of buying, selling, marketing, packing or canning oysters, should be in the nature and form of a contract between the State of Maryland and the applicant, and should provide that the licensee must turn over to the State of Maryland at least ten per cent of the shells from the oysters shucked in his establishment for the current season, and that said licensee should store upon his premises or elsewhere until removed therefrom by the Conservation Department of Maryland on or before the 20th day of August of the season for which said license should be issued, amounted to the taking of private property for public use without making just compensation therefor, and accordingly the taking of property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. It was also specifically alleged and claimed in said petition that the said Act of the General Assembly of Maryland of 1927, Chapter 119, was in violation of other provisions of the Constitution of the United States and of other provisions of the Fourteenth Amendment.

6. That to the said petition of the plaintiffs an answer was filed by the said defendant admitting certain allegations of the said petition and denying others, as will appear from the said answer filed in this proceeding. That to the said answer the plaintiffs filed a demurrer asserting that the same was not sufficient in law, and that nothing alleged [fol. 59] in said answer constituted a ground for denying the prayer of the petition filed by the plaintiffs. That the cause came on for hearing before the Honorable A. S. J. Owens, Judge of the Baltimore City Court, on October 26, 1927, and said court, as hereinbefore alleged, on the 22nd day of December, 1927, passed its final order overruling the demurrer of plaintiffs to said answer, and as plaintiffs elected to stand upon their demurrer to the said answer, further ordered that the said petition of plaintiffs be dismissed, with costs to the defendant. That on the 27th day of December, 1927, the plaintiffs filed an order for appeal to this court from said final order and judgment of the Baltimore City Court. That after hearing in the Court of Appeals of Maryland the said court, on the 19th day of April, 1928, filed its opinion affirming the judgment of the Baltimore City Court, and entered its order and judgment to that effect on the same day. That both in the Baltimore City Court and in the Court of Appeals of Maryland the claim and contention was specifically made that the said alleged Act of the General Assembly of Maryland of 1927, Chapter 119, Section 1, was in violation of the Constitution of the United States, and particularly of the provisions thereof hereinbefore referred to, and expressly mentioned in the petition of plaintiffs.

7. That in the aforesaid judgment and order of the Court of Appeals of Maryland certain errors were committed to the prejudice of your petitioners, all of which will more fully appear from the Assignment of Errors which is filed herewith, but particularly in that said court held the said Act of the General Assembly of Maryland of 1927, Chapter 119, Section 1, to be valid and not in conflict with the Constitution of the United States.

Wherefore your petitioners pray that the writ of error from the Supreme Court of the United States may issue in this case to the Court of Appeals of Maryland, the highest

court of the State of Maryland, wherein a decision in this [fol. 60] case may be had for the correction of errors so complained of, and that your petitioners may be granted the right of appeal to the Supreme Court of the United States, for which they expressly hereby pray (in case such prayer for appeal or such appeal may be the necessary proceeding), and that a transcript of the record, proceedings and papers in this cause, duly authenticated by the clerk of the Court of Appeals of Maryland, may be sent to the Supreme Court of the United States as provided by rule.

William L. Rawls, V. Calvin Trice, Attorneys for Petitioners and Plaintiffs in Error.

Dated the 15th day of June, 1928.

[fol. 61] In the Court of Appeals of Maryland

[Title omitted]

Assignment of Errors—Filed June 15, 1928

Now come Ivy L. Leonard and Thomas B. Leonard, copartners trading as I. L. Leonard and Company, petitioners and plaintiffs in error, by V. Calvin Trice and William L. Rawls, their attorneys, and show that in the record and proceeding and in the rendering of the judgment and decision of the Court of Appeals of Maryland, being the highest court in the State of Mrayland in which a decision could be had in the above entitled cause, manifest error has intervened to the prejudice of these petitioners and plaintiffs in error in the particulars following, to wit:

1. The Court of Appeals of Maryland erred in affirming by its order and judgment the action of the Baltimore City Court in overruling the demurrer filed by plaintiffs in error to the answer of the defendant and in dismissing the petition of the petitioner and plaintiff in error.

2. That the Court of Appeals of Maryland erred in deciding by its final order and judgment in this case that Section 1 of Chapter 119 of the Acts of the General Assembly of Maryland of 1927 was a valid law and was not in conflict with the Constitution of the United States.

3. That the Court of Appeals of Maryland erred in de-
[fol. 62] ciding that the said Chapter 119, Section 1 of the Acts of the General Assembly of Maryland of 1927 did not authorize the taking of property without due process of law contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

4. That the Court of Appeals of Maryland erred in deciding by its final order and judgment that the taking of oyster shells from those engaged in the packing of oysters in the State of Maryland, regardless of whether or not said shells were from oysters taken from the waters of the State, did not amount to the taking of private property for public use without making just compensation therefor and without due process of law as required by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

5. That the Court of Appeals of Maryland erred in deciding that the said Chapter 119, Section 1 of the Acts of the General Assembly of Maryland of 1927 was valid although authorizing the taking of oyster shells from the plaintiffs in error when such shells came from oysters brought into Maryland from other states by the petitioners or by those from whom they purchased them.

6. That the Court of Appeals of Maryland erred in deciding that the said Chapter 119, Section 1 of the Acts of the General Assembly of Maryland of 1927 was valid even though it authorized the taking of oyster shells from petitioners by the defendant in error, which said shells came from oysters taken upon leased beds of the State, title to which oysters had been surrendered by the State under leasing agreements with private parties.

7. That the Court of Appeals of Maryland erred in deciding by its final judgment and order in this case that the said Chapter 119, Section 1 of the Acts of the General Assembly of Maryland of 1927 did not constitute a denial to the petitioners of the equal protection of the laws of the State of Maryland contrary to the provision of Section 1 of
[fol. 63] the Fourteenth Amendment to the Constitution of the United States.

8. That the Court of Appeals of Maryland erred in deciding that the giving of the option to the defendant by said Chapter 119, Section 1 of the Acts of the General Assembly of Maryland of 1927 to determine whether or not he would accept shells or the equivalent of shells in the payment of the exaction imposed by said act was a denial of the equal protection of the laws of the State of Maryland and of due process of law contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

9. That the Court of Appeals of Maryland erred in deciding that the said act was valid although it required petitioners to store upon their premises for a period of three months and twenty days the shells which the defendant should determine to take.

10. That the Court of Appeals of Maryland erred in deciding that said Chapter 119, Section 1 of the Acts of the General Assembly of Maryland of 1927 did not violate the Constitution of the United States even though petitioners and others engaged in the business of packing oysters were subjected to a form and method of exaction imposed upon no other persons in the State of Maryland.

11. That the Court of Appeals of Maryland erred in deciding that the form exaction imposed by said Chapter 119, Section 1 of the Acts of the General Assembly of Maryland of 1927 was justified under the taxing power of the State and did not amount to the taking of property for public use without just compensation being made to the owner as required by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

[fol. 64] Prayer for Reversal

For which errors the plaintiff prays that the said order and judgment of the Court of Appeals of the State of Maryland, dated April 19th, 1928, in the above entitled cause, be reversed and a judgment rendered in favor of said plaintiff and for costs.

William L. Rawls, V. Calvin Trice, Counsel for Plaintiffs in Error.

[fol. 65] IN THE COURT OF APPEALS OF MARYLAND

[Title omitted]

ORDER ALLOWING WRIT OF ERROR AND/OR APPEAL—Filed June 15, 1928

On reading of the petition of Ivy L. Leonard and Thomas B. Leonard, co-partners trading as I. L. Leonard & Company, for a writ of error and or appeal, and the assignment of errors, and upon due consideration of the record of said cause, it is ordered that a writ of error be allowed from the Supreme Court of the United States to the Court of Appeals of Maryland, the highest court of the State of Maryland in which a decision can be had as prayed in said petition, and that the prayer of said petitioners for an appeal to the Supreme Court of the United States be and the same is hereby granted, and that said writ of error and/or appeal and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law, upon condition that the said petitioners and plaintiffs in error do give security in the sum of Five hundred dollars ($500.00), that said plaintiffs in error and/or appellants shall prosecute said writ of error and or appeal to effect, and if said plaintiffs in error or appellants fail to make their plea good, shall answer to the defendant in error or appellee for all costs and damages that may be adjudged or decreed on account of said writ of error — or appeal, and the said plaintiffs in error or appellants now presenting a bond in the sum of Five hundred dollars ($500) with [fol. 66 & 67] the United States Fidelity & Guaranty Company, as surety, it is ordered that the same be and it hereby is duly approved.

In witness whereof I have hereunto set my hand this 15th day of June, 1928.

Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland, the Highest Court of the State of Maryland.

Filed June 15th, 1928.

[fol. 68] Bond on writ of error and/or appeal for $500, approved and filed June 15, 1928, omitted in printing.

[fol. 69] IN COURT OF APPEALS OF MARYLAND

WRIT OF ERROR—Filed June 15, 1928

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Court of Appeals of the State of Maryland, before you or some of you, being the highest Court of Law or Equity of the said State in which a decision could be had in the said suit between Ivy L. Leonard and Thomas B. Leonard, co-partners trading as I. L. Leonard & Company, Appellants, and Swepson Earle, Conservation Commissioner of Maryland and Head of the Conservation Department of the State of Maryland, Appellee, wherein was drawn in question the validity of a statute of the State of Maryland on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of its validity, it appears that said Ivy L. Leonard and Thomas B. Leonard, co-partners trading as I. L. Leonard & Company are entitled to have the said judgment reviewed by the Supreme Court of the United States and they having presented a petition for a Writ of Error and Assignment of Errors to that end;

And we being willing that error, if any hath occurred, should be duly corrected and full and speedy justice done to the parties aforesaid, do command you, that under your seal, distinctly and openly, you send the record, proceedings and judgment aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, and that you have the same in the said Supreme Court of Washington within thirty days from the date hereof so that the said Supreme Court may examine and consider the same and may cause further to be done to

[fol. 70] correct the error therein, if any hath occurred, as of right and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 15th day of June, in the year of our Lord, one thousand nine hundred and twenty-eight.

Arthur L. Spamer, Clerk District Court of the United States for the District of Maryland. (Seal United States District Court, Maryland.)

Allowed this 15 day of June, 1928. Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland.

[fols. 71 & 72] [File endorsement omitted.]

[fols. 73 & 74] Citation, in usual form, showing service on Thos. H. Robinson, filed June 15, 1928, omitted in printing.

[fol. 75] In Court of Appeals of Maryland

[Title omitted]

In the Court of Appeals of Maryland

Stipulation for Transcript of Record—Filed June 15 1928

It is agreed between counsel for the respective parties in this case that the record to be transmitted to the Supreme Court shall contain an entire record of the proceedings in the case in the Baltimore City Court and in the Court of Appeals of Maryland, that is to say, the record shall embrace the petition filed by plaintiffs for the writ of mandamus in the Baltimore City Court, together with the exhibits and affidavit filed therewith, order of Baltimore City Court, dated September 28, 1927, the docket entries of the Baltimore City Court, combined demurrer and answer of

the defendant, Swepson Earle, Conservation Commissioner, with affidavit thereto, demurrer of plaintiff to answer of defendant, other docket entries and record of proceedings in the Baltimore City Court, as set forth in the transcript of the record sent to the Court of Appeals, the opinion of the Honorable A. S. J. Owens, Judge of the Baltimore City Court, final order of the Baltimore City Court, dated December 22, 1927, order of appeal on the part of the plaintiff and affidavit thereto, certification of record by the clerk of the Baltimore City Court, opinion of the Court of Appeals and final order and decree of said court in pursuance of said opinion, appellants' petition for writ of error and/or appeal, assignments of error with order allowing said writ [fol. 76] of error and/or appeal, bond given by plaintiff in error, writ of error, citation to defendants in error with service thereon.

William L. Rawls, V. Calvin Trice, Counsel for Plaintiffs in Error. Thos. H. Robinson, Atty. Gen. of Md., Robert H. Archer, Asst. Atty. Gen. of Md., Counsel for Defendant in Error.

[fol. 77] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 78 & 79] In the Supreme Court of the United States

Statement by Plaintiffs in Error of Points to be Relied Upon and Designation to Print Entire Record—Filed July 12, 1928

Plaintiffs in error in the above entitled proceeding intend to rely therein on each point set forth in their assignment of errors herein, and they herewith specify the entire record herein as necessary for the consideration of said points.

William L. Rawls, Counsel for Plaintiffs in Error.

Plaintiffs in error having specified the entire record as necessary in their opinion for the consideration of the points on which they intend to rely, defendant in error

hereby consents that the Clerk of the Supreme Court of the United States may proceed at once with the printing of the said record accordingly.

Thos. H. Robinson, Attorney General of Maryland,
Counsel for Defendant in Error.

Endorsed on cover: File No. 33,569. Maryland Court of Appeals. Term No. 260. Ivy L. Leonard and Thomas B. Leonard, co-partners, trading as I. L. Leonard & Company, plaintiffs in error and appellants, vs. Swepson Earle, Conservation Commissioner of Maryland and Head of the Conservation Department of the State of Maryland. Filed July 9th, 1928. File No. 33,569.

[redacted]

[redacted]

[redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

NO. 260.

IVY L. LEONARD AND THOMAS B. LEONARD, Co-partners, Trading as I. L. Leonard & Company,

Appellants,

vs.

SWEPSON EARLE, Conservation Commissioner of Maryland, and Head of the Conservation Department of the State of Maryland,

Appellee.

Appeal from the Court of Appeals of Maryland.

STATEMENT OF BASIS OF JURISDICTION OF SUPREME COURT TO REVIEW ON APPEAL THE JUDGMENT BELOW.

(a) There was drawn in question in this suit by the appellants the validity of Chapter 119 of the Acts of the General Assembly of Maryland of 1927 on the ground of its being repugnant to the Constitution of the United

States, and the decision of the Court of Appeals of Maryland, being the highest court of that state in which a decision in the suit could be had, was in favor of the validity of said Act. The case is within the express language of Section 237 of the Judicial Code (U. S. Code, Title 28, Sec. 344).

(b) The final judgment of the Court of Appeals of Maryland was rendered on April 19, 1928. The appeal was prayed and allowed on June 15, 1928 (Record, pp. 53, 60).

(c) A petition for a writ of mandamus was filed by appellants in the Baltimore City Court to compel appellee to issue to appellants a license to engage in the business of packing oysters in the State of Maryland. The petition alleged that the refusal of appellee to issue the license was based upon Chapter 119 of the Acts of the General Assembly of Maryland of 1927, which purported to require any person desiring to engage in the business of packing oysters in the State of Maryland to obtain a license in the nature and form of a contract between the State of Maryland and the applicant for the payment by the applicant of a license fee of $25, and the delivery by him to the Conservation Department of the State of Maryland of at least ten per cent. of the shells from the oysters shucked in his establishment for the current season. The Act further provided that the Conservation Department should remove on or before the 20th day of August of said season the said shells, or at the discretion of the Conservation Department, receive their equivalent in money, the value being determined at the market value of shells as of the first day of May following the close of the season.

Appellants claimed in their petition that the provision of said Act requiring them to enter into such a contract was null and void because in conflict with the Constitution of the United States, and particularly in conflict with the Fourteenth Amendment thereto (Record, pp 10, 11, 12 and 17). Among the grounds upon which said provisions of the said Act were claimed by appellants to be in violation of the Constitution of the United States was that the requirement that appellants should deliver to the Conservation Department of the State of Maryland one-tenth of all shells coming from oysters packed in their cannery *regardless of where the said oysters came from, that is, whether they came from the waters of Maryland or of other states, or whether they came from bottoms which had been leased by the State of Maryland to individuals*, amounted to a taking of private property for public use without just compensation, and therefore constituted a taking of property without due process of law.

The said petition alleged in paragraph 19 as follows:

> "That all of the provisions of the said Chapter 119 of the Acts of 1927, purporting to declare a license to pack oysters a contract between the licensee and the State of Maryland, by which the licensee shall turn over to the State of Maryland at least ten per cent. of the shells from all the oysters shucked by the licensee or the equivalent thereof in money, in the discretion of the Conservation Department, is in violation of both the Constitution of the United States and the Constitution of the State of Maryland, as hereinbefore recited, and your Petitioners allege that all of said provisions and the whole of said subject of the said Act is invalid and that your Petitioners are entitled to a license as they have applied for, without the said provision as to

shells, or money in lieu of shells being in any way applicable to them, because the said provision is void" (Record, p. 17).

An Answer was filed by appellee, to which a demurrer was interposed by appellants (Record, pp. 30 and 31). As will appear from the opinion of the Baltimore City Court, the question of the validity of Chapter 119 of the Acts of 1927 under the Constitution of the United States was expressly passed upon by that Court (Record, pp. 36 and 37). The decision being against appellants, an appeal was taken by them to the Court of Appeals of Maryland. In that court again the question of the validity of the said Act under the Constitution of the United States was expressly raised and passed upon. The opinion of Chief Judge Bond, speaking for the Court, deals solely with the constitutional objections. In one paragraph of the opinion he says:

"The objections urged on the appeal are that the condition attached to the granting of the licenses under this provision is contrary to requirements of the constitutions of Maryland and the United States, in that it would involve a taking of private property of the packers without compensation, and an unlawful delegation of legislative power in directing that the Conservation Department shall determine whether shells or the equivalent in money shall be required from particular packers; would deny to the packers affected the equal protection of the laws in singling them out as a limited class for the exaction, and also involve a taking of private property without compensation in requiring the packers to keep and store the required ten per cent. of their shells for the Department until it removes them" (Record, pp. 44, 45).

All of these objections were considered by the Court, and its judgment was in favor of the validity of the Act (Record, p. 53). Thus, a case is presented clearly within the provision of the Judicial Code above cited, expressly granting the right to these appellants to have the case reviewed in this court, that is to say, the right to have reviewed.

> "A final judgment * * * in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity * * * of a statute of any state on the ground of its being repugnant to the Constitution * * * of the United States and the decision is in favor of its validity."

(d) *King Manufacturing Co. v. Augusta*, decided by this Court May 14, 1928, No. 13 United States Supreme Court, Advance Opinions, page 544.

Respectfully submitted,

WILLIAM L. RAWLS,

Counsel for Appellants.

Supreme Court of the United States

OCTOBER TERM, 1926

NO. 360.

IVY L. LEONARD AND THOMAS B. LEONARD,
Co-Partners, Trading as I. L. Leonard & Company,
Appellants,

vs.

SWEPSON EARLE, Conservation Commissioner of Maryland, and Head of the Conservation Department of the State of Maryland,
Appellee.

Appeal from the Court of Appeals of Maryland.

BRIEF ON BEHALF OF APPELLANTS.

WILLIAM L. RAWLS,
Counsel for Appellants.

Byron Press, Inc., Printers, 420 E. Lombard St., Baltimore, Md.

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IN THE

Supreme Court of the United States

IVY L. LEONARD AND THOMAS B. LEONARD,
CO-PARTNERS, TRADING AS I. L. LEONARD & COMPANY,
Appellants,

vs.

SWEPSON EARLE, CONSERVATION COMMISSIONER OF MARYLAND, AND HEAD OF THE CONSERVATION DEPARTMENT OF THE STATE OF MARYLAND,
Appellee.

Appeal from the Court of Appeals of Maryland.

BRIEF ON BEHALF OF APPELLANTS.

The Question Involved in the Appeal.

This is an appeal from a judgment of the Court of Appeals of Maryland upholding the constitutional validity of Chapter 119 of the Acts of the General Assembly of Maryland of 1927, requiring every person or corporation engaged in the packing of oysters to procure a license from the Conservation Department of the State, which shall be in the nature of a contract between the State and the packer and which shall provide that the licensee shall turn over to the State at least ten per cent. of the shells from the oysters shucked in his establishment for the current season, or, at the option of the Conservation Department of the State shall pay the equivalent of this ten per cent. of the shells in money.

Appellants main contention is, that this act constitutes a taking of private property for public use without just compensation and therefore amounts to a taking of property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

The act does not limit the shells required to be delivered to those taken from the waters of the State, but operates indiscriminately upon all shells regardless of whether they come from within or without the State. It operates also upon shells coming from bottoms theretofore leased by the State to individuals as well as from bottoms owned by the State. Furthermore, nowhere in the act is there any attempt to reserve title in the State to shells coming from bottoms under the control of the State. When the oysters are taken from the waters of the State the taker is free to ship them beyond the State without any obligation to deliver any portion of the shells to the Conservation Department; for the requirement of the delivery of shells is imposed only upon "any person, firm or corporation having a fixed place of business, buying oysters and employing labor to prepare them for market," that is to say, a packer of oysters. Until the shells reach the packer, there is no attempt to impose any obligation upon the owner to deliver any part of them and he may dispose of them wherever and to whomsoever he pleases. The act can not be justified upon the ground that the State is retaking or recapturing property which it owned and has parted with upon the specific condition that a certain part of it must be returned because (1) it has made no reservation of title, and (2) the act is made to apply to property which the State never owned, that is to say, to shells taken from oysters coming from other States and to those coming from leased or private bottoms within the State.

What the act does, therefore, is this—it requires an oyster packer as a condition precedent to his right to engage in or to continue the business of oyster packing to agree that he will deliver to the state a portion of his private property to

be used for a public purpose without any compensation. This it is submitted is a taking of property without due process of law.

The Act of Assembly Involved.

The preamble and pertinent provisions of Chapter 119 of the Acts of 1927 are as follows:

"Whereas, the demand for oysters is constantly increasing and the oyster bars and rocks of Chesapeake Bay and its tributaries are showing such great depletion that constructive legislation is necessary to preserve and rehabilitate such depleted areas, and

"Whereas, a Seafood Committee, consisting of representatives from each tidewater county, was appointed by Governor Albert C. Ritchie, to investigate and recommend remedial legislation to increase the oyster supply of Maryland, among which was the recommendation that the State should reserve ten per cent. of all shells made by the oyster packing houses to be planted upon reserved and seed areas; therefore:

"Section 1. Be it enacted by the General Assembly of Maryland, That Section 91 of Article 72 of the Code of Public General Laws of Maryland, title 'Oysters,' sub-title 'Packing Oysters,' providing for licensing of oyster packers be and is hereby repealed and reenacted, with amendments, to read as follows:

"91. It shall be unlawful for any person, firm or corporation having a fixed place of business, buying oysters and employing labor to prepare them for market to engage in the business of buying, selling, marketing, packing or canning oysters without first taking out a license to engage in such business by application to the Conservation Department of Maryland. Where any such person, firm or corporation operates more than one house for the buying, selling, marketing, packing or canning of oysters, a separate license shall be obtained for each house in which oysters are shucked or otherwise prepared for market; such license to be in the nature and form of a contract between the

State of Maryland and the applicant and shall provide for the payment of a license fee of twenty-five dollars, and shall further provide that the licensee must turn over to the State of Maryland at least ten per cent. of the shells from the oysters shucked in his establishment for the current season, said shells to be removed on or before the twentieth day of August of said season; or at the discretion of the Conservation Department its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the close of the season. The Conservation Department shall notify each packer or canner on or before the said first day of May whether it is its intention to take the ten per centum of the shells from oysters shucked as aforesaid, or its equivalent in money. Said license shall have effect from the first day of September in the year in which it may have been obtained until the twenty-fifth day of April, inclusive, next succeeding.

* * * * * * * * * *

"91A. All moneys derived from said license fee of twenty-five dollars shall be paid over to the Comptroller to be credited to the Conservation Fund, and one-half of the shells received by the Conservation Department shall be transplanted upon such natural beds or bars as may be reserved by the Conservation Commissioner as provided for elsewhere in this Article, and the other one-half of said shells shall be planted on such seed areas as may be set aside by the Conservation Commissioner for seed oysters. In case money is paid in lieu of the ten per cent. of shells, the Conservation Commissioner shall convert same into shells or seed oysters to be transplanted in like manner.

Statement of the Case.

Appellants are engaged in the packing of oysters and for several years before the act of 1927 had owned and

maintained a plant for that purpose at Cambridge, Md. Appellants applied on August 30, 1927, to the Conservation Department for a license to pack oysters for the season 1927-1928, accompanying said application by a check of twenty-five dollars. In their application they expressly denied that the license would be a contract between the State of Maryland and themselves, requiring them to deliver to the former shells or money in lieu of shells, and refusing to enter into any such contract upon the ground that the provisions of Chapter 119 of the Acts of 1927 so requiring were unconstitutional and void. Upon the refusal of the Conservation Department to issue a license upon this application, appellants filed their petition for a mandamus in the Baltimore City Court praying that the Department should be required to issue a license to appellants without the requirement prescribed by the challenged provisions of the act of 1927 (Rec. 2-3). The theory of the petition was that in so far ast the act of 1927 required the payment of the license fee of $25 it was valid, and that this requirement was separable from the invalid provisions with reference to the contract for the delivery of shells.

The petition alleges that during the packing season of 1926-1927 (this season extending from September 1 to April 25) they packed at their place of business 50,800 bushels of oysters, and in the season of 1925-1926, 52,714 bushels of oysters, that in each of these seasons about ten per cent. (10%) of the oysters packed by them were bought outside the State of Maryland (Rec. 2, 7). It alleges also that in addition to these oysters from other states than Maryland, appellants, during the packing season of 1927-1928 (the season for which the license was asked) would use oysters from rented or leased bottoms in the State of Maryland, and that these, together with those coming from states other than Maryland, would constitute about ten per cent. (10%) of the oysters used by them during that season (Rec. 2).

The petition further alleges, upon information that during each year there are shucked and packed in the State of Maryland by various persons, firms and corporations en-

gaged in the packing of oysters, large quantities of oysters from other states, particularly from the States of Virginia and New Jersey, and that in certain sections of the State of Maryland, particularly in Somerset County, Maryland, the quantity of oysters from the State of Virginia shucked and packed by packers and canners in that section and county approximates fifty per cent. (50%) of all oysters shucked and packed therein (Rec. 2).

The appellee filed a combined demurrer and answer to this petition, which, apart from denying the conclusions of law set forth in the petition, challenged certain estimates of appellants as to the proportion of oysters from other states packed by them and others in the same business in Maryland. The answer alleged that, according to reports submitted by appellants to the Conservation Department as required by law for the oyster-packing season of 1926-1927, only two per cent. (2%) of the oysters shucked in the establishment of petitioners during said season did not come from the waters of the State of Maryland, and that during the oyster-packing season of 1925-1926 only one-third of one per cent. (1%) were oysters from states other than the State of Maryland. It further alleged that in Somerset County the quantity of oysters from the State of Virginia shucked and packed by packers and canners in that county was approximately sixteen per cent. (16%) of all the oysters shucked and packed therein, and not fifty per cent. (50%) as alleged in the petition (Rec. 23).

Appellants demurred to the answer of the appellee because, while the figures as to the quantity of oysters packed by appellants and others, originating in other states differed, still the following facts which present the basis of appellants' contention were admitted:

(a) That appellants would, in the natural course of business during 1927-1928, pack oysters not originating in the State of Maryland, but coming from other States, principally New Jersey and Virginia;

(b) That the Act in its operation would result in requiring the packers in Somerset County, State of Maryland, to deliver shells to the Conservation Department which were from oysters imported from other states, to the extent of approximately sixteen per cent. (16%) of all those shucked and packed in that county.

(c) It was also admitted, because not denied, that large quantities of oysters from other states, particularly from the States of Virginia and New Jersey, are shucked and packed by packers in Maryland during each year;

(d) That appellants would pack in the natural course of their business during the season of 1927-1928, oysters which would come from rented or leased bottoms in the State of Maryland, and would not come from the natural oyster rocks of the State.

Upon these facts the case was argued and decided in the Baltimore City Court and in the Court of Appeals of Maryland. From the final judgment of the Baltimore City Court overruling appellants' demurrer to the answer of appellee and dismissing the petition, appellants appealed to the Court of Appeals, where this judgment was affirmed. The question of the validity of the provisions of Chapter 119 of the Acts of 1927 of the General Assembly of Maryland under the Fourteenth Amendment and other provisions of the Constitution of the United States, was expressly raised in the petition, and was decided by the Court of Appeals of Maryland, that court holding the provisions of the said act to be valid.

The Case Is Not Moot.

Appellants filed their petition to obtain the writ of mandamus to compel the issuance of a license for the year 1927-1928. That year has expired, but under the decisions of the Court of Appeals of Maryland where a law requires the renewal of a license from year to year in order to enjoy any privilege, the mere lapse of a particular year does not render judicial proceedings concerning it, moot, because,

as the court holds the rights of the party asking for the license are still involved as to subsequent years.

In view, however, of the decision of this court in *Security Mutual Life Insurance Company v. Prewitt*, 200 U. S. 446, and of the practice approved in the later case between the same parties in 202 U. S. 246, 248, the appellants and appellee have entered into a stipulation which at the argument leave of court will be asked to file, reciting two facts: (1) That appellants renewed their application for a license for the year 1928-1929 in the same form and manner as that in which application was made for the year 1927-1928, and it was refused upon the same grounds by the Conservation Commissioner as those upon which he refused the application for the preceding year. (2) That no shells have been taken from appellants by appellee for the season 1927-1928 in pursuance of the provisions of Chapter 119 of the Acts of 1927, nor has the equivalent in money of said shells been collected by appellee, it being his purpose to withhold any such action until the decision of this case by this court. This proposed stipulation is printed as an appendix to this brief. Accordingly, it appears that the questions involved in the appeal have not become moot by the efflux of time.

Specification of Error.

The appellants have assigned eleven grounds upon which they contend that the judgment of the Court of Appeals of Maryland was erroneous (Rec. 52, 54), all of which grounds are relied on in this court. In substance these assignments of error are:

1. That the exaction of Chapter 119 of the Act of 1927 amounts to a taking of property without due process of law (Assignments 1, 2, 3, 4, 6, 9, 11).

2. That the act imposes an unconstitutional burden upon interstate commerce (Assignment 5).

3. That it denies to the appellants the equal protection of the laws (Assignments 7, 8, 10).

Upon the foregoing statement of facts the appellants submit the following

PROPOSITIONS.

1. That the requirement of Chapter 119 of the Acts of the General Assembly of Maryland of 1927 that oyster packers shall agree to deliver to the Conservation Department of Maryland ten per cent. (10%) of the shells from all oysters packed in their establishment as a condition precedent to obtaining a license to engage in business constitutes a taking of private property for public use without compensation in violation of the Fourteenth Amendment to the Constitution of the United States.

2. The act is in violation of the commerce clause of the Constitution of the United States in that it requires appellants to deliver to the Conservation Department of Maryland ten per cent. (10%) of shells taken from oysters packed by them in Maryland, thus removing that amount of shells from interstate commerce.

3. The act denies to appellants the equal protection of the laws of the State in violation of the Fourteenth Amendment in that it imposes upon them as packers of oysters a form of exaction not imposed upon any other business or occupation.

4. The act compels the packer to keep and store upon his premises ten per cent. (10%) of the shells referred to in the act until they are removed by the Conservation Department without any compensation for the use and occupation of the packers' property and constitutes, therefore, a taking of his property without due process of law.

I.

The intent of the act is clear and if valid would vest in the Conservation Commissioner the power to go upon the premises of appellants, take ten per cent. (10%) of the shells resulting from a season's pack, transport them to some place in Chesapeake Bay to be determined by the Commissioner and there plant them "upon reserve and seed areas." It is a case where the state needing particular property for a specific public use appropriates such property without making any compensation to the owner therefor. This is the inevitable effect of the act unless it can be shown that the property appropriated is not the property of the person from whom it is taken, but of the state itself, or that it is property which, although found in the possession of an individual, such possession is accompanied by some reservation or right in the state which authorizes the state to appropriate it. The question of whether or not the property is the absolute property of the individual from whom it is taken, or whether there exists any right upon the part of the state to take it by reason of any title which it may have, should first be disposed of.

(a) In the first place, with regard to the oysters taken from the beds owned by the state, it will be seen that the act does not purport to make any reservation of title whatsoever to the oysters or to the shells. The state parts absolutely and irrevocably with the oysters, including the shells when it permits them to be taken by the tonger or dredger. *Not a word is said in the act about the retention of any right or title in the state with regard to such oysters.* Unless they reach a canner or packer within the State of Maryland the act does not apply at all. If the person who takes the oysters ships them to another state they are free entirely from the operation of the act. The contention is, therefore, not open to the appellee in this case that the act is dealing with property which belonged to the state and which as the proprietor thereof it had the right to attach

such conditions or reservations to its disposition as it saw fit. No reservations or conditions are attached, the act does not operate until long after the state has unqualifiedly and unreservedly parted with possession of and title to the oysters.

The only words in the act upon which by any possibility it could be contended that an intention is indicated to make any reservation whatsoever are found not in its operative sections but in the preamble, where, referring to the recommendations of a certain seafood committee appointed by the Governor of Maryland, it is said, "among which was the recommendation that the State should reserve ten per cent. (10%) of all shells *made by the oyster-packing houses* to be planted upon reserve and seed areas," etc.

When the oysters are taken from the waters of the State they may be shipped into other States or disposed of in the State of Maryland with perfect freedom and no requirement is made that any part of the shells shall be redelivered to the State unless the oysters reach a packer within the State. The case in this respect is similar to that of *Foster-Fountain Packing Co. v. Haydel*, decided by this Court on October 15, 1928. In that case a statute of Louisiana did attempt by its language to make reservation of title to certain parts of shrimp caught in the State, but permitted the other parts to be freely shipped out of the State and permitted them to be dealt in without any qualification within the State. This Court in holding that the attempt to compel the retention of certain parts of the shrimp within the State was abortive, used this language which is applicable here:

> "It authorizes the shrimp meat and bran, canned and manufactured within the State, freely to be shipped and sold in interstate commerce. The State does not require any part of the shrimp to be retained for consumption or use therein. Indeed only a small part is consumed or needed within the State. Consistently with the act all may be, and in fact nearly all is, caught for transportation and sale in inter-

state commerce. As to such shrimp the protection of the commerce clause attaches at the time of the taking. *Dahnke-Walker Co. vs. Bondurant, supra; Penna. vs. West Virginia, supra,* 221 U. S. 596. As the representative of its people, the State might have retained the shrimp for consumption and use therein. But, in direct opposition to conservation for intrastate use, this enactment permits all parts of the shrimp to be shipped and sold outside the State. The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Biloxi plants. But by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the State necessarily releases its hold and, as to the shrimp so taken, definitely terminates its control. Clearly such authorization and the taking in pursuance thereof put an end to the trusts upon which the State is deemed to own or control the shrimp for the benefit of its people. And those taking the shrimp under the authority of the act necessarily thereby become entitled to the rights of private ownership and the protection of the commerce clause. They are not bound to comply with, or estopped from objecting to, the enforcement of conditions that conflict with the Constitution of the United States."

It is manifest from the language of the Act of 1927 that it was never intended to make any reservation of title in oysters taken from the beds over which the State had control, because it makes no reference whatever to any such oysters but indiscriminately reserves ten per cent. (10%) of all shells made by the oyster-packing houses, regardless of where the oysters come from, whether from within or without the State, or from leased bottoms. Even if it be conceded as to those oyster beds under the control of the State it could attach a condition to the privilege of taking them which would bind all persons in the State

who subsequently come in possession of such oysters to return such percentage of the shells as the State might prescribe, still language adequate to express such a reservation must be employed and the provisions of such a law must be consistent with that intent. No such language is found in the act in question.

As was said by this Court in *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 182, where title to land had been obtained by patent from the United States without reservation, and it was contended that the owner for this reason could make no claim against the Government for its inundation:

> "We do not think it necessary to consume time in proving that when the United States sells land by treaty or otherwise and parts with the fee by patent without reservation, it retains no right to take that land for public use without just compensation; nor does it confer such a right on the State within which it lies, and that the absolute ownership and right of private property is not varied by the fact that it borders on a navigable stream."

(b) What has been said as to the lack of any intention to reserve any title to the oysters which would permit the retaking of their shells after removal from the waters of the State is more clearly shown by the fact that the shells dealt with are shells found in the oyster-packing houses regardless of the origin of the oysters from which they come. The pleadings in this case show that substantial quantities of oysters come from other states and are packed by appellants. Likewise they show that in one of the counties of the State sixteen and one-half per cent. (16½%) of all the oysters packed therein come from other states. The State of Maryland, of course, never had any title or right whatever to such oysters, yet the Act of 1927 plainly attempts to subject them to its operation and requires ten per cent. (10%) of the shells therefrom to be delivered to the Conservation Commission.

Under the law of Maryland certain barren bottoms may be leased to individuals for the planting of oysters. There is no provision in the planting law requiring any part of the shells coming from oysters grown upon these leased bottoms to be delivered to the State, and of course the General Assembly of Maryland cannot, after leases have been made to individuals, attach any such condition without impairing the obligation of its contract. The oysters therefore grown upon these leased bottoms are the private property of the individuals holding the leases, and the State can no more take the shells from such oysters than it can take any other private property without making compensation. Annotated Code of Maryland (Bagby), Article 72, Secs. 98, *et seq.*

The fact that the act by its terms thus operates indiscriminately upon shells taken from oysters coming from without the State and upon leased bottoms within the State, as well as from bottoms under control of the State is a demonstration that it can not be construed as containing a reservation of title to property which it at one time owned because as to a part of the property sought to be taken it has never owned it at all.

It will be noted that the Court of Appeals did not construe the act as applying only to oysters taken from public waters of the State, but held it to be applicable to all oysters packed in the State of Maryland. It upheld the act because it deemed the exaction of shells thereby imposed to be one which the State had a right to make upon oyster packers under its power to conserve and develop the State's natural resources.

But the State can not for such a purpose or for any other purpose take private property for public use without making just compensation therefor. It would be difficult to imagine a case where that fundamental guarantee of private property has been more clearly violated than by the exaction in question. Property which is indubitably that of individuals is appropriated, removed from their premises and devoted to a specified public purpose and no compensation is made therefor. Such a taking of private property,

under the guise of the exercise of the taxing power would, if upheld, make the constitutional guarantee against the taking of private property for public use without compensation meaningless for there must be a fundamental distinction between the power of taxation and the power of eminent domain.

In *New Jersey vs. Anderson*, 208 U. S. 483, 492, it is said:

> "Generally speaking, a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government."

And the same definition is found in *Housk vs. Little River District*, 239 U. S. 254-265.

The power of taxation has been also accurately defined by Judge Dillon in *Hanson vs. Vernon*, 27 Ia. 47:

> "What are taxes * * * I answer that by the concurrent opinion of lawyers, judges, lexicographers and political economists, as well as by the general and popular understanding, taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes, or to accomplish some governmental end."

The power of taxation enables the Government to provide itself with the revenue necessary for its operation. The power of eminent domain is that by which the Government takes particular property from the owner for a public use. To call the taking of specific property needed for a specific public use a legitimate exercise of the power of taxation would nullify the limitation upon the power of eminent domain that compensation shall always be made for the property taken under the exercise of that power. It would seem needless to elaborately discuss the distinction between these two great governmental powers or to enumerate those instances where under grave emergencies they may be found to approach each other in the ultimate results of their exercise.

It would not do to deny that where money under some extraordinary state of circumstances could not be readily obtained by taxpayers that they should be permitted to pay in kind. It is hardly imaginable, however, that any state of circumstances would justify the refusal of an option to a taxpayer by the Government to pay either in money or in kind. Neither is it conceivable that any such form of taxation would be justifiable where the requirement that taxes should be paid in kind is limited to a small class of persons engaged in a particular business and not in the form of a general levy. The fact can not be denied or evaded that under this act the State wanting specific property for a specific public use has exacted that property from a limited number of individuals, without making compensation. Such an enactment is without precedent so far as counsel have been able to find in American legislation.

Neither can there be any force in the argument that public necessity justifies such action on the part of the State. It has the power of eminent domain which will enable it to obtain any property it may need. It has the power of taxation to provide itself with revenue to make compensation for such property. No degree of necessity can justify the overriding of the great principle of justice that no individual should be compelled to devote his property to public use without just compensation. *Delaware, L. & W. R. Co. vs. Town of Morristown*, 276 U. S. 182.

In *Gray upon Limitations of Taxing Power*, p. 130, Section 180, the author by way of contrasting the power of eminent domain with that of taxation, says:

> "The power of eminent domain is the power which the State has, by virtue of its inherent sovereignty, to appropriate for public uses the property of individual citizens, divesting the title of the private owner if need be. The primary reason of its existence is public necessity. It is not a burden imposed on the individual, but relates to the property. The need of the public for the particular piece of property in question is the element which sets the power of eminent domain

in motion. Its ownership, its character of realty or personalty, the inconvenience to the owner as compared with the owners of other property, these are absolutely immaterial considerations. The question in eminent domain is: *Does the State need this particular property for a public use?* "

In Lewis on *Eminent Domain*, Sec. 4, it is said:

"A tax is a contribution exacted by the government from all the individuals of the State, or from those of a particular class or locality, for the purpose of defraying the public expenses. The contribution may be of money or of property. But where property is exacted instead of money *it is not because the State needs the particular property*, but because that form of exaction, owing to the scarcity of money will be more promptly and certainly complied with. Taxation is also based upon some rule of apportionment, as when made upon persons according to number, or upon property according to value or quantity or benefits. In all these respects a tax differs from an exercise of the power of eminent domain. Taxation exacts money or services from individuals, as and for their respective shares of contribution to any public burden. *Private property taken for public use by right of eminent domain, is taken not as the owners share of contribution to the public burden, but as so much beyond his share.* Special compensation is therefore to be made in the latter case because the government is a debtor for property so taken; but not in the former, because the payment of taxes is a duty and creates no obligation to repay, otherwise than in the proper application of the tax. Taxation operates upon a community or upon a class of persons in a community, and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual and without reference to the amount or value exacted from any other individual or class of individuals."

The language of the Act of 1927 leaves no doubt that the object of the legislature was to require from the packer ten per cent. (10%) of their shells because they were desired by the State for the purpose of resuscitating the oyster industry. This the act in terms avows. It separated the packers from all the other people of the State and from all others in any way engaged in the oyster industry for the reason that they had the kind of property which the State wanted. There was no other basis for creating this class of persons.

It is impossible to regard this exaction as a privilege tax or as an excise because, if it had been the intent of the legislature to levy such a tax it would have levied it so that it would have been payable in money. There is no imaginable basis for the exaction in the present case from the limited class of persons described except the desire of the State to get their property. And this is palpably an unconstitutional basis of classification.

It is suggested in the opinion of the Court below that the act is sustainable under the cases of *State vs. Applegarth*, 81 Md. 293, and *Applegarth vs. State*, 89 Md. 140. But reference to those cases will show that they afford no precedent whatever for the legislation here in question. They upheld an ordinary privilege tax or excise levied upon the packers of oysters payable, of course, in money. The rights of the packers in their private property were not disturbed at all.

If the exaction in question violates the fundamental law in that it undertakes to acquire private property for public use without just compensation, it follows of course, that the packer can not be required to submit to this unconstitutional invasion of his property rights as a condition to the exercise of the right to conduct the business of a packer of oysters in the State of Maryland. That is a perfectly lawful business which the appellants in this case and others have conducted over a period of years and in which they have invested large amounts of money. *Neither under the police power nor under any other power*

has the legislature the right to impose an unconstitutional condition to the further conduct of such a business.

No matter how unlimited the power of a State may be with respect to any particular subject matter of governmental regulation, this Court has in a number of decisions declared that it can not exercise such power so as to make the right of a citizen *depend upon his submission to a condition which is in itself a violation of a constitutional provision.*

In *Frost Trucking Co. v. R. R. Com.*, 271 U. S. 583, the exact question was determined. There the State of California undertook, in pursuance of its power to regulate the use of the public highways and also its power to regulate common carriers, to provide that a private carrier should, as a condition precedent to the use of the highways of the State, assume the burden of acting as a common carrier. While the State had the right to regulate private carriers in their use of the State roads, this Court held that the State did not possess the power to require private property to be dedicated to a public use *as a condition precedent to the exercise by a private carrier of the right to use the State highways.* The language of this Court in the decision referred to is so conclusive of the present case that we quote it at length.

> "That, consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt and is not brought into question here. It was expressly so decided in *Michigan Commission vs. Duke*, 266 U. S. 570, 577-578. See also, *Hissem vs. Guran*, 112 O. S. 59; *State vs. Nelson*, 65 Utah 457, 462. The naked question which we have to determine, therefore, is whether the State may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the State altogether to withhold if it sees fit to do so. Upon the answer to this

question, the constitutionality of the statute now under review will depend.

"There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the State possesses; and the other—the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the State does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the State may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

"It would be a palpable incongruity to strike down an act of State legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the State threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the State, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the State in that respect is not unlimited; and one of the limitations is that it may not

> impose conditions which require the relinquishment of constitutional rights. If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." (pp. 592-594.)

Applying this language to the present case we find that even though for the purposes of argument it be conceded that the State of Maryland has the power to impose a privilege tax or an excise upon the packers of the State, or has the power to prohibit the business of packing oysters altogether; nevertheless the State can not make any regulation or prohibition with respect to the business dependent upon any requirement which *per se* is a violation of a constitutional inhibition. Consequently, as the requirement of the delivery of shells by the packer under the act of 1927 constitutes a taking of private property for public use without compensation in violation of the Constitution of the United States, it is invalid even though the State may possess general power of regulating or prohibiting the industry in question, because it attempts to make submission to this violation of the fundamental law a condition precedent to the exercise of the right to conduct the business of a packer and to the use of property already dedicated to that business.

It will also be observed that the exaction of this act operates directly upon the property of the packer, and thus another of the distinguishing features of the power of taxation is absent; that is, that the tax shall be levied upon the individual. In 1 *Cooley on Taxation*, Sec. 24, it is said:

> "The individual and not his property pays the tax. The property is resorted to for the purpose of ascertaining the amount of the tax with which the owner must be charged, and for the purpose of enforcing payment when the owner shall be legally in default in paying at the time stipulated by law."

In normal times, of course, there can be no reason whatever for permitting or requiring a tax to be paid in property. Money will be readily available to those having property, and the only reason why in such times any exaction should be made of a specific kind of property is because the State wants to acquire it without complying with the constitutional mandate that compensation shall be made therefor.

It was suggested in the lower Court that those statutes which have been enacted in various states requiring residents of the State to give a certain amount of labor upon the public roads afforded a precedent for the Act of 1927. It was said that the labor of a man is his property, and if a man's labor could be required, any other form of property could likewise be exacted. This argument, if sound, would make a dead letter of the constitutional inhibition to which we have so often referred. The truth is that those statutes exacting labor are not regarded as taxing statutes at all. They are justified under the power of the State to exact certain services from its citizens as fundamental political duties, like jury service, service in the militia, or in a *posse commitatis*. In *Butler vs. Perry*, 240 U. S. 328, one of these labor statutes was under consideration, it having been challenged upon the ground that it was in violation of the Thirteenth Amendment prohibiting involuntary servitude except as a punishment for crime. Mr. Justice McReynolds, speaking for this Court, goes thoroughly into the history of such legislation and shows that from ancient times the duty of maintaining roads has been placed along with the other political duties referred to above, and the statute was sustained upon that ground. See also the decision of the Court of Appeals of Maryland in *Short vs. State*, 80 Md. 392.

It will be seen by reference to the Maryland decision just cited, as well as to the decision of this Court in *Butler vs. Perry, supra*, that the statutes involved in those cases made it optional with the person subject to the act to render either the labor or its equivalent in money, and this is the form of practically all such statutes. Moreover, they were general

in their operation, all residents of the community being subject to their requirements.

Research has disclosed no vestige of authority giving support to the form of enactment contained in the Act of 1927. There are general statements among the text writers to the effect that taxes may be levied either in money or in property, which, of course, it is not necessary to deny, because there might be occasions where no revenue could be raised unless the taxpayers were permitted to give money's worth instead of money. Such statements, of course, refer to a general levy of taxes in such a form, and do not include the case where an exaction of particular property from a narrow class of individuals amounts to a taking of their property without just compensation. There has, however, never been in this country an example of any levy of taxation payable only in property so far as counsel have been able to find. Certainly no government unless it had some purpose other than raising revenue in mind, would levy a tax payable only in property. It would not take away from the taxpayer the right of paying in money if he so desired. The following quotation from 1 *Cooley on Taxation*, Sec. 23, is illustrative of the statements to which we have referred:

> "Taxes are generally demanded in money and any tax law will be understood to require money when a different intent is not expressed. But if the condition of any State, in the judgment of the legislature shall require the collection of taxes in kind—that is to say by the delivery to the proper officers of a certain proportion of products—or in gold or silver bullion, or in anything different from the legal tender currency of the country, the right to make the requirement is unquestionable, being in conflict with no principle of government, and with no provision of the Federal Constitution. Instances of taxes in kind occurred in the colonial period."

In *Williams* Case, 3 Bland, 186, 255, Chancellor Bland refers to the fact that certain taxes were payable in tobacco in Maryland in colonial times under certain statutes

of the Proprietary Government. In *Lane vs. Oregon*, 7 Wallace, 71, the general statement is made that a State does not have to require taxes to be paid in money, but may make them payable in any form it sees fit.

None of the statements above referred to in any way affords justification for the exaction in question. Tobacco, of course, was legal tender in Maryland in colonial times and was regarded as a substitute for coin, and the remark of Judge Cooley and that of this Court manifestly contemplated similar instances where the State would levy taxes generally upon all of its citizens payable in some product or commodity which could be regarded as a substitute for money. These statements do not sanction the selection of a narrow and limited class of individuals simply because they possess property which the State wants, and compelling them to render a portion of such property to the State while every other citizen is allowed to pay his taxes in money.

II.

It is submitted that upon the authority of *Foster-Fountain Packing Co. v. Haydel, supra*, and the companion case of *Johnson v. Haydel*, the provision of the act in question requiring the delivery of ten per cent. (10%) of the shells from oysters packed within the state is an unconstitutional burden upon interstate commerce. If the state has released any property right it may have in the oysters taken from the bottoms under its control it can not thereafter restrict the movement of these shells in interstate commerce. The requirement, therefore, that ten per cent. (10%) of the shells mentioned shall be delivered to the state necessarily removes this ten per cent. (10%) from the channels of interstate commerce and is not only a restraint upon such commerce, but a denial entirely of the right to engage therein so far as the shells taken are concerned.

III.

What has been said in support of appellants' first proposition is sufficient to show that if the exaction under discussion is regarded as one in the nature of a tax it must fail, because, being imposed upon a narrow class of persons and upon no others, appellants are denied the equal protection of the laws of the State of Maryland. There can be no possible justification for the selection of the class from whom this exaction is made, except the desire of the state to obtain a particular kind of property which they possess. Such a basis of classification it has already been shown is forbidden by the due process of law because of the Fourteenth Amendment. If the contention of appellants is correct in that respect it must follow that the attempt of the Legislature to impose upon them the obligation to deliver a certain portion of their property is a denial to them of the equal protection of the laws of the state. Except in form the contention under the proposition now being discussed does not differ from that set forth under the first proposition advanced in this brief.

IV.

It will be seen that in addition to the requirement that the packer shall, at the option of the Conservation Department, deliver ten per cent. (10%) of the shells in his possession he is further required to store them upon his premises until the 20th day of August in each year. The Act directs the Conservation Department, on the first day of May following the close of the packing season, to notify the packer whether it is its intention to take ten per cent. (10%) of the shells or the equivalent in money, and further provides that if shells are demanded by the department they shall be removed before the 20th day of August thereafter. The packer is thus obliged to keep upon his premises at least ten per cent. (10%) of all shells coming from oysters packed by him during the current season,

which begins on September 1, until the first day of May following. If at that time the Conservation Department decides to take the shells instead of money, the packer is required still further to store the ten per cent. of the shells until removed by the department, which is given until the following 30th of August to complete such removal. Manifestly, therefore, in addition to the appropriation of the shells by the state, the packer must devote a certain portion of his premises to the use of the state without receiving any compensation therefor. It will be seen from the quantities of oysters packed by appellants as disclosed by the record, amounting to 50,800 bushels in one season, and 52,740 in another, that the space upon appellants' premises which it will be necessary to devote to the keeping of these shells is by no means negligible. Even if it be assumed for purpose of argument only, that the State could require the delivery of the shells in the way provided by the act under consideration, it could not in the exercise of such a right require appellants to devote a substantial portion of their property to the storage of the shells, where as to some of them the period of storage would continue for nearly a year.

The decision of this court in *Delaware, L. & W. R. R. Co. v. Town of Morristown, supra*, would seem to be conclusive of the present case. There the Railroad Company maintained upon its property a hack stand, the use of which was limited to one operator of hacks. The town undertook by ordinance to make this private stand a public one upon the ground that this would promote the public welfare. In holding this ordinance void this court said:

> "The police power may be and frequently it is exerted to effect a purpose or consummate an enterprise in the public interest that requires the taking of private property; but, whatever the purpose or the means employed to accomplish it, the owner is entitled to compensation for what is taken from him. The railroad grounds, station, platforms, driveways, etc., are used by the petitioner for the purposes of its business as a common carrier; and, while that business is subject to regulation in the public interest, the property

used belongs to petitioner. The state may not require it to be used in that business, or take it for another public use, without just compensation, for that would contravene the due process clause of the Fourteenth Amendment." (p. 193.)

CONCLUSION.

It is respectfully submitted that for the foregoing reasons the judgment of the Court of Appeals of Maryland should be reversed and the case remanded so that the writ of mandamus may issue as prayed.

Respectfully submitted,

WILLIAM L. RAWLS,

Counsel for Appellants.

APPENDIX.

Stipulation of the Parties.

It is hereby stipulated and agreed between the parties to this case that:

1. The appellants, in the month of September, 1928, renewed their application for a license to pack oysters at their plant in Cambridge, Dorchester County, Maryland for the season of 1928-1929, in the same form and manner as it appears from the record herein that application had been made for the season 1927-28, and that said application was refused by the appellee in the form and manner in and by which he refused the said application of appellants for the said season of 1927-28, as shown by the record herein.

2. It is further stipulated and agreed between the parties hereto that no shells have been taken from appellants by the appellee for the season 1927-28 in pursuance to the provisions of Chapter 119 of the Acts of General Assembly of 1927, nor has the equivalent in money of said shells been collected by said appellee, it being the purpose of the parties to withhold any such action until the decision of this case by this Court.

(Signed) WILLIAM L. RAWLS,
Attorney for Appellants.

THOMAS H. ROBINSON,
Attorney General,
Attorney for Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 260.

IVY L. LEONARD AND THOMAS B. LEONARD, CO-PARTNERS, TRADING AS I. L. LEONARD & COMPANY,

Plaintiffs in Error and Appellants,

versus

SWEPSON EARLE, CONSERVATION COMMISSIONER OF MARYLAND, AND HEAD OF THE CONSERVATION DEPARTMENT OF THE STATE OF MARYLAND,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

BRIEF ON BEHALF OF APPELLEE.

THOMAS H. ROBINSON,
Attorney General,

ROBERT H. ARCHER,
Assistant Attorney General,

HENRY H. JOHNSON,
Counsel for Appellee.

The Daily Record Co., Print, Baltimore, Md.

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IVY L. LEONARD AND THOMAS B. LEONARD, Co-Partners, Trading as I. L. Leonard & Company,
Plaintiffs in Error and Appellants.

versus

SWEPSON EARLE, Conservation Commissioner of Maryland, and Head of the Conservation Department of the State of Maryland,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

BRIEF ON BEHALF OF APPELLEE.

This is an appeal from the Court of Appeals of Maryland, upholding the validity of an Act of the Maryland Legislature passed at its session of 1927, and known as Chapter 119 of the Acts of that year.

The opinion of the Court of Appeals of Maryland has not yet been officially reported, but can be found in the record of this case, beginning at page 37, and in The Daily Record of Baltimore, Maryland, of Thursday, May 3, 1928.

STATEMENT OF THE CASE.

The case was commenced by the filing of a writ of mandamus by the appellants for the purpose of testing the constitutionality of Chapter 119 of the Acts of 1927. The Act in question repeals and re-enacts, with amendments, Section 91 of Article 72 of the Code of Public General Laws of Maryland, title "Oysters," sub-title "Packing Oysters," and adds a new section to said Article, to be known as Section 91-A. This Act is fully set out in paragraph 7 of the plaintiffs' petition (R., pp. 4 and 5).

Previous to the passage of this Act, a license for the packing of oysters had been required in Maryland since 1884. By Chapter 257 of the Acts of 1884, packers who handled hermetically sealed cove oysters were required to render a monthly statement to the State Treasurer, and pay 1/10 of a cent per bushel on all oysters so packed. The next Act in reference to this subject was Chapter 380 of the Acts of 1894, which repealed and re-enacted Article 72. By Section 66 of this Act, every person, firm or corporation engaged in the business of packing and canning oysters was required to pay $25.00 for such license, and in addition thereto, the sum of $1.00 per thousand bushel for every thousand bushel over ten thousand. This Act further provided that if the packer did not wish to disclose the operation of his business, he might pay a lump sum of $300.00, and in that event, not be required to file reports. This law remained in force until 1906, when it was repealed and re-enacted, making the packers' license the flat sum of $25.00. In 1922 it was again repealed and re-enacted, making a fee of $25.00 for each and every house that the packer operated.

For the past seventy years, the Maryland Legislature has, from time to time, passed legislation for the pro-

tection of the oyster industry. The earlier Acts had to do with the regulation of the taking of the oysters; naming closed seasons, designating areas on which dredges could not operate, prescribing the size of oysters to be taken, etc.; and when it was found that in spite of these regulatory measures, the supply of oysters was rapidly decreasing, laws permitting and protecting the private planting of oysters were adopted. First, by the enactment of local legislation; next, by what was known as the five-acre planting law permitting citizens of the counties bordering on the oyster grounds to take up five acres of oyster bottom; and finally, by the passage of the Haman Oyster Law in 1906, which was afterwards amended by the Sheppard Law in 1914. The last two Acts providing for a survey of all the waters of the State in which oysters grow, for the purpose of establishing which of the bottoms were producing oysters and permitting the barren bottoms to be leased for the purpose of growing oysters thereon by private planting.

Notwithstanding all this regulatory and planting legislation, however, the oyster production declined from over 15,000,000 bushels per annum to less than three million bushels, and it became apparent that other measures must be adopted if the State wished to save its greatest natural resource.

Experiments conducted by the Shell Fish Commission, which was created under the Haman Law, and afterwards by the Conservation Department, which was created by Chapter 682 of the Acts of the General Assembly of Maryland of 1916, and took over the duties of the Shell Fish Commission, which was abolished, assisted by the Federal Government and other States interested in oyster production, showed that the only economical and practical way to rehabilitate depleted oyster bottoms is

by depositing oyster shells thereon, for the purpose of furnishing something for the oyster spat to attach itself to, in order that it may grow and become an oyster. The shells in addition to providing something for the oyster spat to attach itself to provides the lime necessary for the young oysters to form its shells. Experiments have shown that where depleted bottoms are treated in this manner and enough oysters still remain thereon to furnish the spat, that in a few years such bottom will again become productive. The time when oyster shells first acquired a commercial value marks the period when oyster production began to show a decline. Before there was a demand for these shells by poultry food dealers, fertilizer factories, and County Commissioners for road building purposes, they were of no value to the packers and a hindrance to their operations. This being the case, the packers would have the dredge boats after unloading their catch, load their boats with shells before returning to the oyster beds to be thrown overboard on the natural bars from which they had been taken.

If an oyster bottom is allowed to become entirely barren, it is necessary to plant live oysters thereon to furnish the spat, which is a very expensive operation.

After the passage of the Haman Law, citizens of Maryland began leasing barren bottoms and planting seed oysters thereon, but the supply of seed oysters was so limited that such planting could only be conducted on a very small scale. To remedy this condition, the Legislature authorized the Conservation Department to designate, as a seed area, an area at the head of Chesapeake Bay where oysters would not mature, for the reason that the water was too fresh, and allowed those oysters to be taken up under the direction of the Conservation Department, to be placed upon the fertile oyster beds

farther down the bay, and also for sale to private planters, but it developed that the taking of these small oysters from the seed area for the purpose of replanting, was depleting this area also.

In the meantime, the Conservation Department, as stated above, had been experimenting by depositing oyster shells on natural bottoms which had become depleted, but were not entirely barren, and these experiments had proven very satisfactory.

This was the situation that confronted the State when the Legislature convened in 1927.

In the year 1926 the Governor of Maryland had appointed a Sea Food Committee, composed of practical men engaged in the seafood industry, a number of whom were oyster packers, for the purpose of making recommendations to the Legislature to protect the seafood industry. This committee recommended that oyster packers, in addition to paying the annual license of $25.00, be required to turn back to the State 10 per cent. of the shells from the oysters shucked at their packing houses. One-half of these shells to be planted by the Conservation Department upon the natural oyster beds and bars, which had become depleted, and the other half to be planted upon the seed area in order that the State might have sufficient seed oysters to rehabilitate the oyster bottoms which had become absolutely barren and could not be brought back by the planting of shells alone.

The natural oyster beds and bars in the waters of Maryland have always been maintained, protected and regulated by the State in its sovereign capacity as representative of the people, and for the use and benefit of its citizens.

Acting upon the recommendation of the Sea Food Committee, Chapter 119 of the Acts of 1927 was passed by the Legislature, and contained in addition to the recommendation of the committee a provision that the State might in lieu of 10 per cent. of the shells require the packer to pay the value thereof in money to be determined by the market value of the shells as of May 1st, following the close of the oyster packing season on April 25, with a proviso that with the money so obtained, the Conservation Department must purchase other shells to be used for the same purpose. This provision was placed in the Act for the reason that some of the packing houses are located in such a manner that while it would be very advantageous to sell the shells for commercial purposes, it would not be economical or practical for the State to get them for planting, and it would be of advantage to the State and particularly to the citizens thereof engaged in the oyster industry, to let the packer sell these shells, turn over 10 per cent. of the money to the Conservation Department, and have this money reinvested in shells from packing houses located near the area on which the shells are to be planted, thus saving transportation charges to the State.

The Act further provides that all shells must be removed before August 20th, following the packing season, it having been clearly demonstrated by experiment that the best result can be obtained by planting the shells in the late spring or early summer, that is, between the middle of May and the middle of August. This provision imposes no hardship on the packers for the reason that the season for packing oysters is closed from 25th April to the 1st September each year.

The Act in question became effective on the first of June, 1927, the first oyster packing season to be effected by it commencing on the first of September, 1927.

The appellants refused to take out a license to pack oysters under the provisions of the Act in question, and filed a petition in the Baltimore City Court asking for a writ of mandamus to compel the appellee to issue them a license upon the payment by them of the sum of $25.00, as previously required (R. 1).

To this petition an answer was filed by the appellee (R. 22). The appellants demurred to this answer (R. 26) which demurrer was overruled by the lower Court (R. 29), and an order signed dismissing the petition (R. 35). From this order the appellants appealed to the Court of Appeals of Maryland (R. 36). The Court of Appeals of Maryland affirmed the order of the lower Court in an opinion delivered by Chief Judge Bond (R. 37), whereupon the appellants filed a petition for a writ of error and prayer for appeal (R. 47), and assignment of errors (R. 52), whereupon the Court of Appeals of Maryland signed an order allowing writ of error and appeal to the Supreme Court of the United States (R. 55).

ARGUMENT.

I.

THE LAW IN QUESTION ONLY IMPOSES AN OCCUPATIONAL LICENSE TAX OR FEE, IN ASKING FOR THE PAYMENT OF SAME BY DELIVERY OF TEN PER CENT. OF SHELLS OR ITS EQUIVALENT IN MONEY; AND DOES NOT CONSTITUTE A TAKING OF PRIVATE PROPERTY IN VIOLATION OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II.

THE ACT DOES NOT IN ANY WISE RESTRICT OR INTERFERE WITH OR REGULATE THE SHIPMENT OF OYSTERS OR SHELLS EITHER INTO OR OUT OF THE STATE, AND, THEREFORE, IS NOT REPUGNANT TO THE COMMERCE CLAUSE OF THE CONSTITUTION.

III.

THE ACT DOES NOT IMPOSE ANY UNJUST OR IMPROPER RESTRICTIONS OR BURDENS UPON THE LICENSEES OR DENY TO THEM THE EQUAL PROTECTION OF THE LAW.

I.

The chief objection to the Act advanced by counsel for the appellants in the argument of the case in the Maryland Courts, was, that the taking of the shells constitutes a confiscation of private property without due process of law or just compensation, and further that the tax is not uniform in that it taxes the packers to the exclusion of other persons engaged in the oyster industry.

This argument was based on the theory that the tax in question was a tax on property, and not an occupational tax.

The appellee's answer to this argument is that the tax imposed is a license or occupational tax, and, therefore,

is not subject to the rules and limitations applicable to the taxation of property.

When the packer applies for his license he asks the State for the privilege of engaging in the packing of oysters, just as a merchant asks the State for a dealer's license to sell merchandise. The State, by the Act in question, tells him that he can engage in this occupation provided he remunerates the State for the privilege granted by the payment of $25.00 per annum for each packing house operated, and by turning over to the State 10 per cent. of the shells from the oysters packed in his packing house, or its equivalent in money, to be used by the State for the purpose of conserving the oyster industry.

The Chief Judge of the Court of Appeals of Maryland, in deciding this case, said (R. 43):

> "A property contribution as the price of condition of a license or privilege sought, while unusual, is not unprecedented."

And again (R. 42), he states:

> "There is some novelty in exacting a contribution of tangible property, even as a measure of co-operation for the private individual's benefit, or as the condition of a privilege, but novelty alone does not, of course, render it invalid."

Cooley on Taxation, Section 23, Volume 1, page 92, 4th ed., in speaking of taxation in general, says:

> "Taxes are generally demanded in money, and any tax law will be understood to require money when a different intent is not expressed. But if the condition of any state, in the judgment of its legislature, shall require the collection of taxes in kind—that is to say, by the delivery to the proper officers

of a certain proportion of products—or in gold or silver bullion, or in anything different from the legal tender currency of the country, the right to make the requirement is unquestionable, being in conflict with no principle of government, and with no provision of the Federal Constitution. Instances of taxes in kind occurred in the colonial period. A levy is sometimes made payable in labor; but this has commonly been restricted to the labor needed to keep the highways in repair; and while it is in its nature a tax, it partakes, to some extent at least, of a police regulation."

No exception to this rule is to be found in any of the chapters following in his four volumes on this subject.

See also:

Perry vs. Washburn, 20 Cal. 318;
Williams Case, 3 Bland (Md.) 186, 255;
Parkman's Old Regime, 302;
2 Rives' Life of Madison, 146.

In the case of Lane Co. vs. Oregon, which is reported in 7 Wallace (U. S.) 71, 19 L. ed. 101, the Supreme Court of the United States, speaking through Chief Justice Chase, decided that the Legislature of a State may prescribe the manner in which taxes may be collected. The part of the opinion referring to this subject is found on page 105, and is as follows:

"If, therefore, the condition of any State, in the judgment of its Legislature, requires the collection of taxes in kind, that is to say, by the delivery to the proper officers of a certain proportion of products, or in gold and silver bullion, or in gold and silver coin, it is not easy to see upon what principle the National Legislature can interfere with the exercise, to that end, of this power, original in the States, and never as yet surrendered. If this be so, it is, certainly, a reasonable conclusion that Congress did

not intend, by the general terms of the Currency Act, to restrain the exercise of this power in the manner shown by the Statutes of Oregon."

In the case now before the Court, the Maryland Legislature has directed that the license tax to be paid by the packers of oysters shall be partly paid in kind, that is, by the delivery of 10 per cent. of the shells from the oysters so packed, or its equivalent, to the Conservation Commissioner of Maryland.

The question as to whether a tax of this kind is a tax on property or was valid as an occupational tax under the Police Powers was before the Court of Appeals of Maryland in the cases of State vs. Applegarth, 81 Md. 293, and Applegarth vs. State, 89 Md. 140. These cases came before the Court upon the question of the constitutionality of the oyster packers' license law as enacted by Chapter 380 of the Acts of 1894 of the General Assembly of Maryland. The first case deciding the question of the constitutionality of the Act as a license law for the packing of oysters in Maryland, and the second case decided that the fact that the oysters packed came from without the State did not affect the constitutionality of the Act.

The Act in question imposed a tax of one dollar ($1.00) on each one thousand bushels of oysters packed in addition to a license of twenty five dollars ($25.00). In both cases the Court decided that the tax in question was an occupational tax and was constitutional. It is contended, therefore, that the provision of the Act requiring 10 per cent. of the shells or money in lieu thereof is an occupational tax, and it makes no difference where the oysters come from.

In the case of Applegarth vs. State, 89 Md. 140-142, the Court says:

> "But we fail to comprehend in what respect the Constitution has been violated by the provisions of this Act, unless it be true that every license issued to a merchant is unconstitutional because he must sell goods that were made in, and shipped from some other State. In other words, on whatever stock he purchased outside of the State he would not be required to pay any license.
>
> "To sanction the contention of the appellant would be to grant immunity to the citizens of the State of Virginia by releasing them from taking out certain licenses, which the citizens of Maryland are, under the Act of 1894, required to obtain. We know of no Act ever passed by the Legislature of this State which was intended to confer benefits upon other States, but which denied to this State equal benefits. Mr. Justice Field, delivering the opinion of the Court in the case of Webber vs. Virginia, 103 U. S. 350, says: 'No one questions the general power of the State to require licenses for the various pursuits and occupations conducted within her limits, *and to fix their amount as she choses.*' And again, from the same case: 'A State may require a license for the sale of sewing machines, although the machines are patented under the laws of the United States, where there is no discrimination against machines outside the State.' * * * The right to require the payment of license fees for the privilege of carrying on business of different kinds has been recognized for many years in this State, and the license fees required to be paid have been fixed, in the discretion of the Legislature, according to circumstances and the character of the business."

There is no difference between the Act then under question and the present Act, except that the payment of the license tax is paid in shells or its equivalent in money and the few incidental burdens relied upon by the

appellants, such as the possibility of storage of shells for a few weeks. The Act in question specifically designates the use of the shells or money received in payment of the license—something which the Act of 1894 did not provide. The Act states that the shells shall be restored to the oyster bottoms, or if money is paid, then shells and seed oysters shall be purchased therewith and returned to the bottoms. *In what other way could there be a more direct benefit to the oyster packer than by this method?* Generally when taxes or license fees are paid they go into a common fund of the State and from there are distributed to the various sub-divisions under the direction of the Legislature. If there is anything unconstitutional about this Act it would perhaps be better argument on the part of the remaining citizens of the State to object than it would be for the packers because they get no benefit from these receipts other than, perhaps, to reduce the appropriation which they have been paying each year for the protection and conservation of the oysters. The various legislatures have in the past appropriated great sums of money to protect the natural seafood resources and simultaneously with the passage of the Act of 1927, the State budget provided for an appropriation of $95,000.00 from the State funds for each of the years 1927 and 1928 for the purpose of purchasing shells and seed oysters, in addition to those procured under the provisions of this Act. This amount was about double the amount heretofore appropriated by any Legislature of this State. The same Legislature increased the various other license fees connected with the oyster industry, such as the tongers license, the dredgers license, inspection tax, etc., and provided other regulatory measures for conservation, such as increasing the minimum size of the oysters which may be taken, shortening the season when oysters may be caught, and more liberal leasing laws.

The oystermen themselves, viz. the persons who catch the oysters for a livelihood, together with the oyster packers, viz. those who take the oysters from the shells and place them in containers (the class to which the appellants belong), both demanded legislation for the restoration of the natural oyster beds and bars of the Chesapeake Bay and its tributaries; the Act in question in this case being only one item of the great conservation and restoration program adopted by the 1927 session of the Maryland Legislature.

It might be well to note at this point that while the oyster packers of Maryland get some oysters from leased bottoms and from outside the State for the purpose of shucking and packing, due to the depleted condition of the natural oyster bars, they were just as urgent as the oystermen in insisting on the passage of the legislation referred to, and a large number of these packers are today advocating the tax in question.

The question as to whether this Act falls within the due process clause of the 14th Amendment of the Constitution of the United States, or whether it is within the taxing powers of the State under its police regulations, is the sole question involved in this case. The Act must fail if it is a taking property without due process; whereas, if it is an occupational or privilege tax the question of equal protection of the law or the commerce clause is of no consequence, but these subjects will be touched upon later.

Mr. Lewis, on Eminent Domain, Section 14, says:

> "As we have already seen, private property may be taken or affected for public use, not only under the power of eminent domain, but also under the powers vested in the State, as the Power of Taxa

tion, Police Power, and the War Power. * * * The just compensation required to be made is an equivalent, either in money, or in special benefits to the particular property. In no case is the individual compensated in the matter of money exacted for taxes or loss occasioned by any exercise of police powers. In short, these powers would be rendered nugatory, if such compensation was obligatory in case of their exercise. It is enough that the tax or police regulation promotes, or is calculated or intended to promote, the general welfare. The individual receives his only compensation by sharing in the common benefit * * * it does serve to keep the other powers (meaning taxes and police powers) within their legitimate bounds, but within those bounds it has no application. * * * It is evident that it would absolutely preclude the exercise of the power of taxation or police regulation, if applied thereto; for it is impossible to receive the benefit of a tax until it has been collected and expended, or of a police regulation until it has been made and enforced."

In Section 2 of the same volume, Mr. Lewis classifies the various acts of power which may be legitimately used over private property as follows:

1. Regulating the making of contracts between citizens with respect to property, and prescribe generally as to their validity and effect; for instance: Statute of Frauds, Statute of Wills, etc.

2. Laws for the attachment and sale of property on civil process, the bastardy laws, support of wife and children.

3. Laws imposing fines and forfeitures.

4. Laws regulating public health, safety and welfare, known as Police Power, or the rights of Police Regulation.

5. **The State may exact of the individual a contribution or a portion of his property—based upon some rule of apportionment, or the possession of some privilege or franchise, or the exercise of some trade or calling, in order to provide a fund for defraying the necessary expenses of the government. This is known as the Right of Taxation.**

For the distinction between eminent domain and taxation, see

Lewis on Eminent Domain, Section 4;
Moale vs. Baltimore, 5 Md. 314, 320;
Cooley on Taxation, Sec. 30 (4th ed.).

Livingston vs. City of Paduch, 80 Ky. 660, in quoting *Cooley on Taxation* with approval, says:

> "It is only when statutes are passed which imposes taxes on false or unjust principles, or operate to produce gross inequality so that they cannot be deemed in any sense proportioned in their effect on those who are to bear the public charges, that Courts can interfere and arrest the course of legislation by declaring such enactment void."

It has not been urged by the appellants that the law would be unconstitutional if the license fee was payable in money instead of shells, but it is more or less conceded, we believe, on their part, that there would be no objection to the Act if money was all that was required. It should be borne in mind that the Act provides for the payment in equivalents. The 10 per cent. of shells is the same as the equivalent in money at the market price as of May 1st and vice versa. In other words, the Conservation Commissioner can exact all of the payment in money in lieu of shells. It would, therefore, avail nothing, or at least the objectionable feature of the bill could be avoided in the actual operation of the Act by the

Commisisoner so electing to take money. It is not the test whether it is a tax on property or the taking of property without due process that the Legislature has asked for the payment in any certain manner.

The test is whether the tax or license fee is one which can lawfully be imposed upon the business or occupation of the oyster packers as a revenue measure or under the police powers of the State, to regulate the oyster packing business, by providing for incidental license fee.

A license for the packing of oysters in Maryland has been required since 1884, and has continued in force with slight changes since that time.

See:

Acts of the General Assembly of Maryland,
1884, Chapter 257;
1894, Chapter 380;
1906, Chapter 188;
1922, Chapter 519;

the last act being the one in force at the time of the passage of the Act in question.

These several acts withstood the assaults made upon them in the Maryland Courts on the grounds that they violated (a) Article 23 of the Declaration of Rights of Maryland; (b) Article 3 of the Constitution of Maryland; (c) Articles 4 and 14 of the Constitution of the United States; and the only question involved in this case which has not been raised in the previous ones is the right of the State to require the payment of the tax in oyster shells (the offal from the commodity packed), or its equivalent in money.

A State has a right to devise its own system of taxation free from federal interference.

Kelly vs. Pittsburg, 104 U. S. 78, 26 L. ed. 658.

"It was not the intention of the Fourteenth Amendment to subvert the systems of the states pertaining to general and special taxation; that amendment legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property, as is afforded by the Fifth Amendment against similar legislation by congress; and the federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the state, applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property or deprivation of personal rights."

French vs. Barber Asphalt Paving Co., 181 U. S. 324, 45 L. ed. 879.

The preservation of game and fish is within the proper domain of the police power of the State.

Lawton vs. Steele, ~~152~~ 152 U. S. 133.

Preservation of fish and the regulation of fishing is for the common benefit of the people and legislation directed to that end is a valid exercise of the police power of the State.

Manchester vs. Massachusetts, 139 U. S. 240.

The protection of the game supply is within the well-settled boundaries of the police power of a state.

New York ex rel. Silz vs. Hesterberg, 211 U. S. 31.

The source of the police power as to game birds is the duty of the State to preserve for its people a valuable food supply.

Geer vs. Connecticut, 161 U. S. 519.

If it is deemed for the welfare of a state to discourage the destruction of herring for manure, and to preserve them for food for man or for salmon, and to that end impose a greater tax upon that part of the industry than upon similar use of other fish or offal of salmon it can hardly be said to be contravening the Federal Constitution. There is nothing in it that prevents a license tax upon the manufacturer of fish oil, fertilizer and fish meal in whole or in part, from herring, even though the tax be greater than that imposed upon similar use of other fish.

Alaska Fish Salting and By-Products Co. vs. Smith, 255 U. S. 44.

Courts in determining what is due process of law in the deprivation of a person of his property, are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has previously been regarded as within the police power.

Sentell vs. New Orleans & C. R. Co., 166 U. S. 698, 17 Sup. Ct. Rep. 693.

The appellants rely upon the Frost Trucking Company vs. R. R. Com., 271 U. S. 583, as being a parallel case with the one now at bar, and quote at some length the opinion rendered by this Court in that case. There is not any similarity or analogy between the two cases. We agree with the Court that it would be depriving one of his property without due process if it was attempted to change the status of the company from a private carrier

to a common carrier, as the duties, burdens and obligations of one are so different from those of the other, but in this case the mere fact that the Act calls for the payment of part of the license tax in shells rather than money does not change the status of the oyster packer, or change any of the fundamental principles of taxation upon which the Act relies.

A similar situation arose in the case of Del., L. & W. R. R. Co. vs. Town of Morristown. There the R. R. Company was asked to relinquish its right and use over certain of its property for the establishment of hackstands for which no just compensation was received by the R. R. Company.

In summing up the question as to whether it is a taking of property without just compensation, or if it falls within the power to tax an occupation or busines, or is under the general police powers of the State, we cannot make it stronger than the law as laid down in the cases referred to above, where Chief Judge Bond says (R. 41):

> "As has been argued for the appellees, the present act may be viewed as imposing a license or occupational tax, in that it makes its demand upon persons who are to engage in a particular occupation, and the demand is to be measured by the volume of business of each one affected. And it is appropriately made upon those persons because it has as its object the repair of damaging effects of the pursuit of their occupation. It seeks its ultimate purpose, the repair, more directly than does the usual occupational tax in demanding a contribution of tangible property rather than of money with which the property might be procured. State vs. Applegarth, supra. The material which will be needed for the repair is material which will be accumulated by the packers themselves, and a contribution in kind rather than one in money seems to be a direct, convenient

arrangement; and it would seem to involve no further reach of governmental power. It seems to us, however, that the act may be accurately described as establishing merely a condition upon which the oyster supply of the State may properly be drawn upon and dealt in, or as fixing a necessary incident of the exercise of the privilege sought. The greater part of the burden of conservation, undertaken largely for the benefit of the packers, for the preservation of their livelihood, indeed, is to be borne by the State at large, and what is demanded of the packers as the condition of their license, may be regarded as a measure of cooperation, one which they are peculiarly equipped to contribute."

II.

As to the Act violating the Commerce Clause of the Constitution, we ask in what way does it do so? Shells are not a commodity which are dealt with by the the oyster packers of this State as an article of import or export trade, and no restrictions have been placed upon them which would in anywise prohibit them from being shipped in or from the State. There is not anywhere in the Record to be found any allegation of any unfair dealings or motives on the part of the State of Maryland in dealing with the oyster business, or any ulterior motive in the passage of this Act, nor can any be found in the Act itself. No question has been raised or even intimated that the Act is any other than a conservation measure designed to protect the oyster business within the State for the benefit of, not only the citizens of the State at large, but particularly those engaged in the business of oyster packing, as well as the catcher, the one upon whom the packer must depend for his supply. It was not designed to prohibit the citizens of another state from packing oysters coming from our State waters, or from the grounds leased by the State to the planters. Neither

does it prohibit the packer from packing oysters coming into the State. The reservation of title in the oysters caught within the State does not enter into this controversy at all. Nothing could be clearer than these facts to show that the Act does not come within the prohibitions of the commerce clause or raise the question as to when title in oysters ceases in the State and becomes the private property of the packers.

Since the decision in this case was given by the Court of Appeals of Maryland, this Court has handed down a decision in the case of Foster-Fountain Packing Company, Inc., et al., vs. Haydel, et al., decided on October 15, 1928, which case while having as a subject matter shrimp, also a sea-food product, and relied on by the appellants as having some bearing upon the case before you, is not at all analogous to this case. There, as the Court very wisely stated, the Louisiana Act attempted, under the guise of conservation, to prohibit the shipments of shrimp with their hulls and heads in tact, from the State, claiming that the hulls were good for fertilizer, when, as a matter of fact, the Court pointed out, very little, if any, of the shrimp offal was ever used for this purpose, and naturally the question of ownership of title played a great part in that case. As stated above, no attempt has been made by Maryland to reserve title in the oysters taken from the oyster beds of the State.

The Court of Appeals of Maryland has decided a number of times, as stated by Chief Judge Bond, that oysters as well as fish and game generally, are originally the property of the State, that is, of the people in their sovereign capacity (R. 40).

Judge Butler in the Foster case quotes from Lacosts vs. Department of Conservation, (La.) 263 U. S. 545, as follows:

> "The wild animals within its borders are, so far as capable of ownership, owned by the State in its sovereign capacity for the common benefit of all its people. Because of such ownership, and in the exercise of its police power, the State may regulate and control the taking, subsequent use and property rights that may be acquired therein."

He also affirmed the Geer vs. Connecticut case by quoting therefrom:

> "Passing, however, as we do, the decision of this question, and granting that the dealing in game killed within the State * * * created internal State commerce, it does not follow that such internal commerce became necessarily the subject-matter of interstate commerce, and therefore under the control of the Constitution of the United States * * * (p. 532). The fact that internal commerce may be distinct from interstate commerce, destroys the whole theory upon which the argument of the plaintiff in error proceeds."

While in this case we do not think the reservation of title is essential, yet we have referred to the above to show that it was not at all necessary to so provide in our laws, as the appellants seem to think. The main object of our act is the purpose of conservation of the oyster supply of the State as distinguished from preventing the shipments of oysters out of the State. It might be well in passing to say that the Act is not applicable at all to the oysters in their raw state, whether they come from the natural beds of our waters, from leased bottoms, or from another State. The oysters in their raw state are undoubtedly the property of the packer, whether he buys

them from the catcher, opens his own oysters or buys them in another State. The meat taken from the oyster is packed in containers. Therefore, no element of restraint of the shipment of oysters in their raw state is anywhere intimated in the Act.

We have already pointed out that the Act is not objectionable to the due process clause, because it is an occupational tax or a regulation under the police power.

The following cases show that it is not objectionable to the commerce clause by reason of oysters coming in from another State.

Applegarth vs. State, 89 Md. 140;
Browning vs. Waycross, 233 U. S. 16;
Askrew vs. Cont. Oil Co., 252 U. S. p. 444;
Leisy vs. Harding, 135 U. S. 100;
Pierce Oil Corp. vs. Hopkins, 264 U. S. 137;
S. O. Co. vs. Brodie, 153 Ark. 114.

III.

While the Act requires the oyster packer to retain upon his premises ten per cent. of the shells from the oysters shucked at his packing house until they are required by the State, or until the 20th of August following the close of the oyster season, in the event that the State decides to take shells instead of their equivalent in money, still this does not impose any considerable burden on the packer for the reason that his packing house cannot be operated from the 25th of April until the first of September (Acts of the General Assembly of Maryland, 1927, Chapter 119, Section 91).

In passing on this question the Maryland Court of Appeals says (R. 45-46):

"The burden is a slight one, no greater than other burdens necessarily imposed on individuals in practical working plans for collecting taxes, as, for instance, the burden imposed upon warehousemen to advance the owners' taxes on goods deposited, as that on retailers of gasoline and oils to collect and pay the taxes on purchases from them. Hannis Distilling Co. vs. Baltimore, 114 Md. 680, 681. Pierce Oil Co. vs. Hopkins, 264 U. S. 137. And we think it is to be classed with those necessary burdens, and is too slight to justify stamping the whole beneficial scheme as one involving unconstitutional discrimination among packers. And especially does this appear true when it is remembered that what is now being considered is the constitutionality of a condition upon a privilege, in a scheme for the packers' own benefit, one which appears to be about as practical and economical a scheme as can be advised. * * *

"The burden which might fall upon packers by requiring them to hold the shells on their premises until the department removes them seems to us an unsubstantial one, to be classed with those temporary burdens incidental to the individual's compliance with a lawful public demand, such as the burden of preparing books or accounts for the assessment of taxes, entry of public officers upon private property for the purposes of preliminary surveys, seizure of milk and other merchandise for tests. State vs. Mayhew, 2 Gill 487, 500; Stewart vs. Baltimore, 7 Md. 500, 516; Lewis, Eminent Domain, Sec. 228. The requirement would, in this aspect, seem analogous to one of the holding of garbage on private property for collection, which is sometimes a requirement against the interest of the owner of the premises. Gardner vs. Michigan, 199 U. S. 325. And apart from these considerations this requirement also seems justified as a reasonable, or even necessary, part of a lawful condition attached to the privilege sought."

It is well known that the oyster packer has been considered in a class that is subject to an occupational tax,

recognized as such in Maryland since 1884, and the test has been both on the flat rate as well as on the amount of business done, and is supported by a number of Supreme Court decisions in addition to the decisions of the highest Court of Maryland.

State vs. Shapiro, 131 Md. 168;
State vs. Applegarth (supra);
Rohr vs. Gray, 80 Md. 276;
S. O. Co. vs. Brodie, 153 Ark. 114;
Ozan Lumber Co. vs. Union Co. Natl. Bank, 207 U. S. 251;
Brown-Foreman Co. vs. Ky., 217 U. S. 563;
So. Western Oil Co. vs. Texas, 217 U. S. 114.

In the case of Pacific American Fisheries vs. Alaska, 269 U. S. 269, 46 Sup. Ct. Rep. 110, the Court said that the imposition of a license tax on fish canners graduated according to the size of the pack is not unconstitutional as discriminating against large canners in favor of small ones, where, because of the expense of operation, the small pack may mean a loss, while a larger one may show a profit, so that a tax may be a just attempt to apportion the burden to probable gain.

Also in Clark vs. Titusville, 184 U. S. 329, 22 Sup. Ct. Rep. 382, speaking of licensing merchants generally, the Court says:

> "An ordinance imposing a license tax upon the merchants of a city, by which they are divided into classes according to the amount of their sales, each class including all whose sales range between a certain minimum and maximum amount, does not violate the equality clause of the United States Constitution, 14th Amendment, although the result is to make persons in different classes pay different rates, and to make those in the same class pay at a different ratio if the amounts of their sales differ."

CONCLUSION.

It is, therefore, respectfully submitted that the judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

THOMAS H. ROBINSON,
Attorney General,

ROBERT H. ARCHER,
Assistant Attorney General,

HENRY H. JOHNSON,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 260.—October Term, 1928.

Ivy L. Leonard and Thomas B. Leonard, Co-Partners, Trading as I. L. Leonard & Company, Plaintiffs in Error and Appellants,

vs.

Swepson Earle, Conservation Commissioner of Maryland and Head of the Conservation Department of the State of Maryland.

Appeal from the Court of Appeals of Maryland.

[May 13, 1929.]

Mr. Justice McReynolds delivered the opinion of the Court.

In Maryland, the business of oyster packing is important and for many years has been licensed and taxed as a privilege. Most of the live oysters having been taken by tongs or dredges from bottoms in Maryland—a small per cent. come from Virginia and New Jersey—are sold to packers. At some convenient place on shore, they are shucked; the edible portion is placed in containers and shipped to points throughout the Union. Formerly, the detached shells had no commercial value and often were disposed of by dumping into the Bay. Later they came into demand and were commonly sold for use in road-making, manufacture of fertilizer, chicken feed, etc.

Investigation disclosed that the producing beds were being rapidly exhausted. A Committee of Experts reported to the Legislature that the only practicable method of preventing their destruction was to place empty shells upon them and thus furnish the support and lime essential to growth of spat.

Thereupon, Chap. 119, Act of 1927—the statute here in question and printed below*—was enacted. This requires those who buy

*Section 1. Be It Enacted by the General Assembly of Maryland, That Section 91 of Article 72 of the Code of Public General Laws of Maryland, title "Oysters," sub-title "Packing Oysters," providing for licensing of

oysters and prepare them for market at a fixed place to take out a license "in the nature and form of a contract between the State of Maryland and the applicant" which shall provide for payment

oyster packers be and is hereby repealed and re-enacted with amendments, to read as follows:

91. It shall be unlawful for any person, firm or corporation having a fixed place of business, buying oysters and employing labor to prepare them for market to engage in the business of buying, selling, marketing, packing or canning oysters without first taking out a license to engage in such business by application to the Conservation Department of Maryland. Where any such person, firm or corporation operates more than one house for the buying, selling, marketing, packing or canning of oysters, a separate license shall be obtained for each house in which oysters are shucked or otherwise prepared for market; such license to be in the nature and form of a contract between the State of Maryland and the applicant and shall provide for the payment of a license fee of twenty-five dollars, and shall further provide that the licensee must turn over to the State of Maryland at least ten per cent. of the shells from the oysters shucked in his establishment for the current season, said shells to be removed on or before the twentieth day of August of said season; or at the discretion of the Conservation Department its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the close of the season. The Conservation Department shall notify each packer or canner on or before the said first day of May whether it is its intention to take the ten per centum of the shells from oysters shucked as aforesaid, or its equivalent in money. Said license shall have effect from the first day of September in the year in which it may have been obtained until the twenty fifth day of April, inclusive, next succeeding.

Sec. 2. And Be It Further Enacted, That a new section to be known as 91 A be added to Article 72 of the Code of Public General Laws of Maryland, title "Oysters," to follow immediately after Section 91 of said Article, be and is hereby added to read as follows:

91 A. All moneys derived from said license fee of twenty-five dollars shall be paid over to the Comptroller to be credited to the Conservation Fund, and one-half of the shells received by the Conservation Department shall be transplanted upon such natural beds or bars as may be reserved by the Conservation Commissioner as provided for elsewhere in this Article, and the other one-half of said shells shall be planted on such seed areas as may be set aside by the Conservation Commissioner for seed oysters. In case money is paid in lieu of the ten per cent. of shells, the Conservation Commissioner shall convert same into shells or seed oysters to be transplanted in like manner.

Sec. 3. And Be It Further Enacted, That all laws or parts of laws of the State of Maryland, general or local, inconsistent with the provisions of this Act be and the same are hereby repealed to the extent of such inconsistency.

Sec. 4. And Be It Further Enacted, That this Act shall take effect June 1st, 1927.

of $25.00; also that the "licensee must turn over to the State of Maryland at least ten per cent. of the shells from the oysters shucked in his establishment for the current season," to be removed by August 20th, or, at the discretion of the Conservation Department, to pay their equivalent in money.

Appellants own land and buildings in Dorchester County used by them in the packing business "for several years last past" and they intend to continue in the business. During the season of 1926 they packed fifty thousand bushels. At the proper time—August 30, 1927—they duly applied to defendant for a license to conduct operations during the season following and offered to pay the designated fee of $25.50. But they refused to agree to deliver to the State 10% of the empty shells or to pay their market value, upon the ground that the statutory provision requiring this was contrary to State and Federal Constitution. Upon refusal of the application they asked the State court for an appropriate writ of mandamus. Judgment went against them and was affirmed by the Court of Appeals.

Here appellants do not deny the power of the State to declare their business a privilege and to demand therefor reasonable payment of money. Their main insistence is that exaction of 10% of the empty shells, or equivalent market value at the election of the Commission, would be a taking of their property for public use without compensation. They also suggest that this would unduly burden interstate commerce; would deny them equal protection of the laws; and finally, that to compel storage of the shells until taken by the State would unlawfully deprive them of the use of their premises.

We find no reason to doubt the power of the State to exact of each oyster packer a privilege tax equal to 10% of the market value of the empty shells resulting from his operations. This, we understand, is not questioned by counsel. And as the packer lawfully could be required to pay that sum in money, we think nothing in the Federal Constitution prevents the State from demanding that he give up the same per cent. of such shells. The result to him is not materially different. From the packer's standpoint empty shells are but ordinary articles of commerce, desirable because convertible into money. Their value is not large and the part taken by the State will be so used as greatly to advantage the business of

packing. The purpose in view is highly beneficent and the means adopted are neither arbitrary nor oppressive. The Federal Constitution may not be successfully invoked by selfish packers who seek to escape an entirely reasonable contribution and thereby to thwart a great conservation measure generally approved.

In *Lane County* v. *Oregon*, 7 Wallace 71, 77, this Court, through Mr. Chief Justice Chase, said:

> "The extent to which it [the power to tax] shall be exercised the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. . . . . If, therefore, the condition of any State, in the judgment of its legislature, requires the collection of taxes in kind, that is to say, by the delivery to the proper officers of a certain proportion of products, or in gold and silver bullion, or in gold and silver coin, it is not easy to see upon what principle the national legislature can interfere with the exercise, to that end, of this power, original in the States, and never as yet surrendered."

Cooley on Taxation, 4th Ed., Vol. 1, Sec. 23, p. 92—

> "Taxes are generally demanded in money, and any tax law will be understood to require money when a different intent is not expressed. But if the condition of any state, in the judgment of its legislature, shall require the collection of taxes in kind—that is to say, by the delivery to the proper officers of a certain proportion of products—or in gold or silver bullion, or in anything different from the legal tender currency of the country, the right to make the requirement is unquestionable, being in conflict with no principle of government, and with no provision of the Federal Constitution. Instances of taxes in kind occurred in the colonial period."

And see *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 329.

Appellants' business is local in character, and has no such intimate connection with interstate commerce as to exempt it from control by the State. The mere fact that some of the live oysters come from other States does not change the character of the enterprise. *Browning* v. *Waycross*, 233 U. S. 16; *Askren* v. *Continental Oil Co.*, 252 U. S. 444, 449; *Wagner* v. *City of Covington*, 251 U. S. 95, 102.

There was abundant reason for placing oyster packers in a separate class for taxation purposes. Appellants' claim that equal protection of the laws will be denied them is groundless.

The requirement concerning storage for a limited time of 10% of the empty shells imposes no serious burden, is but part of the general scheme for taxing the privilege, and is no heavier than demands to which taxpayers are often subjected. It is neither oppressive nor arbitrary. *Pierce Oil Corp.* v. *Hopkins*, 264 U. S. 137, 139.

Considering the nature of the controversy and the agreement between the parties touching appellants' purpose to continue in the packing business, it cannot be said that the cause has become moot. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 307, 308; *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433, 452; *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498, 514, 516; *McGrain* v. *Daugherty*, 273 U. S. 135, 182.

The judgment of the Court of Appeals is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.